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No. ___

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM V. BIDWILL, *et al.*,

Petitioners,

vs.

EDWARD R. GARVEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether pension plan contributions conditioned on being "allowable as deductions under the applicable provisions of the Internal Revenue Code" can be ordered to be made, even though they cannot be claimed on any federal income tax return when made, and almost certainly will never be "allowable as deductions."

2. Whether trustees of a pension trust, established pursuant to Section 302(c)(5) of the Labor Management Relations Act but also subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), can be assumed to have broad discretionary powers to increase plan benefits, notwithstanding the absence of trust language to that effect and a negotiating history demonstrating that such authority was removed from the trustees.

LIST OF PARTIES[1]

Petitioners are William V. Bidwill, James Kensil, and Michael Lynn, the three individuals (collectively, the "Management Trustees") appointed as co-trustees of the Bert Bell NFL Players' Retirement Plan (the "Plan") by the NFL Management Council ("Management Council"), an unincorporated association serving as the multi-employer bargaining representative of the NFL Clubs; the Management Council; the Member Clubs (the "Clubs") of the Management Council, including the Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; Dallas Cowboys Football Club, Inc., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; The Detroit Lions, Inc., d/b/a Detroit Lions; The Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; The Los Angeles Raiders, Ltd., d/b/a Los Angeles Raiders; Los Angeles Rams Football Company, Inc., d/b/a Los Angeles Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; New England Patriots Football Club, Inc., d/b/a New England Patriots; The New Orleans

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[1] Pursuant to Rule 29.1, the following corporations are either parent companies, subsidiaries (except wholly owned subsidiaries), or affiliates of any petitioner that is a corporation: KSA Industries, Inc. (Houston Oilers); San Francisco Forty-Niners, Inc. (San Francisco Forty-Niners); and Jack Kent Cooke Incorporated (Washington Redskins).

Saints, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; The Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; Chargers Football Company, d/b/a San Diego Chargers; San Francisco Forty-Niners, Ltd., d/b/a San Francisco 49ers; Seattle Professional Football, d/b/a Seattle Seahawks; St. Louis Football Cardinals Co., d/b/a Phoenix Cardinals; Tampa Bay Area NFL Football, Inc., d/b/a Tampa Bay Buccaneers; and Pro-Football, Inc., d/b/a Washington Redskins; and the National Football League (the "NFL"). Respondents are Edward R. Garvey, Danny Jiggetts, and Thomas Condon, the three individuals (collectively, the "Player Trustees") appointed as co-trustees of the Plan by the NFL Players' Association (the "NFLPA").

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on August 30, 1991, and October 9, 1991, respectively, as amended October 28, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 943 F.2d 498 (4th Cir. 1991), and is reprinted as Appendix A. The relevant opinions and orders of the United States District Court for the District of Maryland are reprinted as Appendices B through H. Appendices B, C, and E are reported at 10 Employee Benefits Cas. (BNA) 1540 (D. Md. 1988), 10 Employee Benefits Cas. (BNA) 1547 (D. Md. 1988), and 743 F. Supp. 393 (D.

Md. 1990), respectively. The other opinions and orders of the District Court are unreported. The orders of the Fourth Circuit on rehearing are reprinted as Appendix I, and are unreported.

JURISDICTION

The parties to the underlying action invoked the federal question jurisdiction of the District Court. 28 U.S.C. §1331. On July 22, 1988, November 15, 1990 and December 4, 1990, the district court entered orders imposing liability upon petitioners. *See* App. 32-33a, 96-97a, and 98-104a.

Following petitioners' appeal of those orders, the Fourth Circuit entered a judgment and opinion on August 30, 1991, affirming in part and reversing in part the orders of the District Court. App. 1a. Following its review of petitioners' petition for rehearing with suggestion for rehearing *en banc*, the Fourth Circuit denied both the petition and the suggestion for rehearing *en banc* by order dated October 9, 1991, but remanded certain issues to the District Court. App. 105-106a. The opinion of August 30, 1991, was amended by an order dated October 28, 1991. App. 107a.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent portions of 26 U.S.C. § 404(a)(1), concerning the deductibility of employers' contributions to an employees' trust or annuity plan, and the pertinent portions of 26 U.S.C. § 4972(c), concerning the

amount of nondeductible contributions to an employees' trust which are subject to excise tax, are reprinted as Appendix J.

STATEMENT OF THE CASE

In 1982, the National Football League Players' Association ("NFLPA") and the NFL Management Council ("Management Council") negotiated a comprehensive new collective bargaining agreement (the "1982 CBA") that included detailed provisions regarding pension benefits for NFL players. The pension provisions differed from those contained in all prior collective bargaining agreements between the parties. Under all prior collective bargaining agreements, the 28 NFL professional football clubs[2] (collectively, the "Clubs") were obligated to contribute specified sums to the Bert Bell NFL Players' Retirement Plan (the "Plan"), and the Plan's Retirement Board (the "Board"), consisting of three Player Trustees and three Management Trustees,[3] was given the discretion to set benefit levels periodically to reflect prevailing conditions and actuarial predictions.

Unlike the prior collective bargaining agreements, however, the 1982 CBA directed the Board to set benefits at specific levels, and explicitly amended the Plan documents to remove the Board's previous authority to set benefit levels. App. 3a. The 1982 CBA also provided that the Clubs would contribute $12.5

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[2] See the List of Parties for the names of the 28 NFL professional football clubs.

[3] The Commissioner of the NFL is the seventh, non-voting member of the Board. App. 2a. The Board is maintained pursuant to Labor Management Relations Act Section 302(c)(5), and the Plan is a "Taft-Hartley Plan." 29 U.S.C. § 186(c)(5).

million to the Plan each year for five years, "provided that such contributions are allowable as deductions under the applicable provisions of the Internal Revenue Code." *Id.* In general, contributions to a defined benefit pension plan are deductible so long as the plan is not overfunded.[4] The first such payment was scheduled to be made on March 31, 1983, and the last payment was scheduled to be made on March 31, 1987. App. 3a.

In the favorable investment environment of the early 1980's, the Plan's investment return greatly exceeded expectations, and the Plan became overfunded. That overfunding had two consequences for the Clubs' scheduled $12.5 million contribution due in March 1984: only $7.5 million of that payment was needed to maintain benefits at the levels set by the 1982 CBA, and the additional $5 million would not have been immediately deductible under the Internal Revenue Code ("IRC"). The Clubs accordingly withheld the nondeductible $5 million payment for March 1984.[5]

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[4] *See* 26 U.S.C. §§ 404(a)(1)(A), 412(c)(7).

[5] On September 10, 1984, the Board filed a request with the Internal Revenue Service that asked the IRS to rule that the contributions in dispute would be fully deductible under special multiemployer pension plan funding rules found at 26 U.S.C. § 413(b)(7), notwithstanding the general deductibility limits found at Section 404(a)(1). In early 1987, the IRS advised the Board that it had made a preliminary determination that Section 413(b)(7) did not affect the deductibility of the contributions under 26 U.S.C. § 404(a)(1). A final ruling confirming the preliminary determination was issued by the IRS on July 30, 1987, in which the IRS held that "the excess of the amounts contributed ($12,500,000) over the deductible limit under section 404(a) are not deductible for the year of contribution, but may under section 404(a)(1)[(E)] be carried over and deducted in subsequent

The Plan remained overfunded in March 1985, March 1986, and March 1987, when the Clubs made partial or no contributions because the Plan's overfunding rendered the full $12.5 million contributions both non-deductible and unnecessary to maintain the level of benefits agreed upon in the 1982 CBA. App. 3-4a.

On March 5, 1987, the Management Trustees filed a declaratory judgment action in the United States District Court for the District of Maryland seeking judicial interpretation of the Plan phrase, "allowable as deductions." The Player Trustees counterclaimed, alleging that the Management Trustees had breached their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1001, *et seq.*, by failing to sue the Clubs to collect the allegedly delinquent contributions and otherwise to act in the best interests of the Plan's participants and beneficiaries. The Player Trustees also filed suit on behalf of the Plan against the NFL, the Management Council and the Clubs for the unpaid contributions and interest. App. 4-5a.

The District Court ruled that the phrase "allowable as deductions" contained no temporal limitation, and that the full $12.5 million was due each year, on the District Court's assumption that the Clubs could carry over excess contributions and deduct them in future years. The District Court entered judgment against the Clubs in the amount of $17.8 million plus double interest, attorneys' fees, and costs. App. 19-33a. The District Court subsequently found that the Management Trustees had breached their fiduciary duties un-

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taxable years subject to the deductible limits for such years." Priv. Ltr. Rul. 87-43-077 (July 30, 1987).

der ERISA for failing to pursue the Clubs promptly for the contributions that were not made, and for failing to amend the Plan to increase benefits. App. 50-63a.

Petitioners appealed. The Fourth Circuit affirmed the District Court's holding that the term "allowable as deductions under the applicable provisions of the Internal Revenue Code," found in the 1982 CBA and in section 3.2 of the Plan, contained no temporal limitation and ordered the full $12.5 million contribution to be made each year. The Fourth Circuit also agreed with the District Court that any amount not deductible in the year paid could be carried over to unspecified future years and ultimately deducted. App. 6-9a. The Fourth Circuit concluded that the Board possessed the authority to increase Plan benefits, but reversed the District Court's holding that the Management Trustees had breached their fiduciary duties by not agreeing to increase such benefits, because the issue had been unclear and the Management Trustees had exhibited diligence in attempting to resolve the matter. App. 9-18a.

While the issue of the Board's present authority to increase Plan benefits forms part of this petition, review is not sought with regard to the issue of alleged breach of fiduciary duty concerning any of the Management Trustees' prior acts.

REASONS FOR GRANTING THE WRIT

Although arising in the context of professional sports, this case presents questions of law that are central to the construction and administration of employee benefit plans throughout the American economy. The Fourth Circuit's decision is fundamentally

irreconcilable with prior decisions of this Court and other federal appellate courts and with settled principles of statutory construction. Far from resolving the delicate issues characteristic of employee benefit plans, the Fourth Circuit's decision will generate additional uncertainty and litigation, with the result that fiduciary powers and obligations, and beneficiary entitlements, will remain confused and unsettled.

The United States Department of Labor has reported that at the time this case arose in 1987, there were over 235,000 defined benefit pension plans, covering approximately 29 million participants.[6] More recent estimates show that public and private pension plans had assets in excess of $2.9 trillion at the end of 1990; of that figure, approximately $1.3 trillion was being held in private trusteed pension funds, with $144 billion being held in multiemployer pension plans alone.[7] Another recent estimate shows that the tax incentive being given employers to maintain pension plans represents the single largest tax expenditure in the current United States budget.[8]

This case potentially affects all of the collectively bargained pension plans included in these statistics, by forcing the employers that have conditioned their contributions upon deductibility to make those contributions to such plans regardless of whether or not

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[6] Bureau of National Affairs, *Pension Reporter*, Vol. 18, pages 1430-31 (1991).

[7] Employee Benefit Research Institute, *Issue Brief* 4, table 1 (No. 116; July 23, 1991).

[8] Office of Management and Budget, *Budget of the United States Government—Fiscal Year 1992*, Part 3, at 40 (U.S. Gov't Printing Office, Wash. D.C. 1991).

those contributions are actually deductible. This case also potentially affects all employee benefit plans by giving the fiduciaries of such plans the power to invoke general plan language to make fundamental plan changes regardless of the provisions of any collective bargaining or other agreement governing such plans.

I. The Fourth Circuit's Decision Conflicts With Fundamental Federal Tax Law Principles, by Forcing Pension Plan Contributions Conditioned On Their Deductibility To Be Contributed And Capitalized.

The Fourth Circuit has committed an error involving a fundamental question of federal tax law that affects virtually all tax-qualified pension plans by holding in this case that pension plan contributions are conclusively deemed to be "allowable as deductions" in the year they are contributed—even though those contributions are not capable of being claimed as deductions on any federal income tax return filed for that year.

Section 404(a)(1) of the Internal Revenue Code, 26 U.S.C. § 404(a)(1), which controls the deductibility of any contribution made to a tax-qualified pension plan, provides no clear answer to this question, because that section does not contain the phrase, "allowable as deductions." Section 404(a)(1) simply provides that employer contributions made to a tax-qualified pension plan will be "deductible" in the taxable year in which paid to such a plan—but only if such contributions are otherwise deductible and fit within a labyrinth of funding limitations based on actuarial assumptions designed to gauge a plan's financial status.[9]

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[9] This case involves the deductibility of contributions to a de-

The District Court and the Fourth Circuit avoided the deductibility quandary completely by turning to 26 U.S.C. § 404(a)(1)(E). That section provides that nondeductible pension plan contributions can be carried forward and deducted in a future tax year, but only if those nondeductible contributions can qualify as tax-deductible in that future tax year, or in some subsequent tax year. The Fourth Circuit made two sweeping and unsupported assumptions about § 404(a)(1)(E): (1) that a pension contribution that must be capitalized is just as "allowable as [a] deduction[]" as an immediately-deductible contribution; and (2) that 26 U.S.C. §404(a)(1) guarantees a federal income tax deduction—eventually—to any employer making a pension plan contribution.

By rejecting the Fourth Circuit's erroneous and unworkable standard, this Court would provide much-needed guidance to plan sponsors and plan fiduciaries in the proper interpretation of 26 U.S.C. §404(a)(1), last visited by this Court in *Don E. Williams Co. v. Commissioner*, 429 U.S. 569 (1977),[10] by deciding

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fined benefit plan, like the defined benefit pension plan involved in *Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989). Unlike the overfunded defined benefit pension plan in *Mead*, though, the NFL Plan contains no provision permitting any return to the Clubs of nondeductible contributions or excess Plan assets. Thus, once a contribution is made, the Clubs cannot recapture it, even if the contribution later proves to be erroneously made. App. 3a.

[10] In *Don E. Williams*, this Court held that a taxpayer had to make actual contributions to a tax-qualified pension plan in order to be eligible to claim a federal income tax deduction for the contribution. However, this Court did not consider whether the presence of 26 U.S.C. § 404(a)(1)(E) meant that all such contributions could automatically be considered allowable as deductions, as and when made.

when a pension plan contribution can be considered "deductible" under that Section. Providing such guidance will help lower courts and countless plans and plan fiduciaries avoid future problems in the interpretation and enforcement of 26 U.S.C. § 404(a)(1), and in the interpretation and enforcement of several other federal tax and pension statutes that are based on the tax rules governing the funding of defined benefit pension plans.[11]

A. Capitalization Is Not The Equivalent Of An "Allowable Deduction."

Any taxpayer consulted on the subject will readily say that being able to deduct an expenditure immediately for federal income tax purposes is vastly preferable to capitalizing that cost and taking a federal income tax deduction sometime in the indefinite future. The reason is simple: profound economic differences exist between a deductible expense and a capitalized cost. The Fourth Circuit's holding in this case ignores those economic differences. That holding deprives the Clubs of the economic value of the tax deduction associated with pension plan contributions, by stripping the Clubs of their cash in exchange for the prospect—but hardly the guarantee—of a federal income tax deduction years later, when such a deduction will have lost much of its economic value.[12] In essence, the Fourth Circuit's reading of the phrase

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[11] *E.g.*, 26 U.S.C. §§ 4971, 4972, 4975 and 29 U.S.C. §§ 1104, 1106, 1132 and 1145.

[12] Accounting principles recognize that a federal income tax deduction that is indefinitely postponed becomes a federal income tax deduction whose economic value is substantially diminished. *See* Brown and Lippett, *Are Deferred Taxes Discountable?* 14 Journal of Finance & Accounting 121 (Spring 1987).

"allowable as deductions" in this case is the pension plan equivalent of saying that a taxpayer's purchase of a building is "allowable as a deduction," simply because depreciation deductions on that building are "allowable" over a period of several years.

This Court has made repeated forays into the capital-versus-expense distinction and into Congress's conscious economic value judgment to force taxpayers making certain expenditures to capitalize those expenditures and claim the related tax deductions over a period of several tax years, even though those taxpayers are being taxed on the basis of their yearly incomes.[13] In *Commissioner v. Tellier*, 383 U.S. 687 (1966), this Court drew a fundamental distinction between a deductible expense and a nondeductible capital expenditure, noting that 26 U.S.C. § 162(a) was designed to "clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures, which, if deductible at all, must be amortized over the useful life of the asset." 383 U.S. at 689-690, *citing Welch v. Helvering*, 290 U.S. 111, 113-16 (1933).

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[13] Professor Bittker has observed that the IRC was built upon the principle of calculating income and deductions on a tax year-by-tax year basis:

> Taxable income and tax liabilities are computed on the basis of taxable years; subject to certain qualifications, each year's income and tax liability are determined independently of the results of other years.

1 Bittker, *Federal Taxation of Income, Estates and Gifts*, ¶ 3.5.5, 3-58 (2d ed. 1989). Professor Bittker also noted that with respect to any expenditure that is required to be capitalized, the effects of inflation and deflation can only be eliminated if capital outlays can be deducted in full when made. *Id.*, at 3-57 n. 34.

Unlike the legal expenses in *Tellier* and the expenditures in other capitalization cases previously before this Court,[14] pension plan contributions traditionally have been viewed as having the fundamental characteristics of wages; such payments have never been made independently subject to capitalization, except in certain narrow circumstances clearly identified by Congress.[15] The Fourth Circuit's implicit use of capitalization principles in this case to justify a finding that pension plan contributions are "allowable as deductions" under 26 U.S.C. § 404(a)(1), even when required to be capitalized, ignores the fact that a pension plan contribution lacks the fundamental characteristic of a capital asset: a useful life that extends beyond the immediate taxable year in which the payment was made.

This case thus presents this Court with the necessity to resolve a critical question involving capitalization by clarifying when pension contributions can be considered deductible under 26 U.S.C. §404(a)(1). Absent clarification by this Court, the Fourth Circuit's reading could eliminate the economic differences separating an "allowable deduction" from a

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[14] *E.g., Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345, 358 (1971) (financial institution's deposits with the Federal Deposit Insurance Corporation were required to be capitalized, because the deposits represented an expenditure having a "life" of several years); *and Commissioner v. Idaho Power Co.*, 418 U.S. 1, 12-20 (1974) (utility that constructed its own facilities was required to capitalize otherwise-deductible expenses incurred in connection with the creation of the new facilities).

[15] *See* 26 U.S.C. § 263A and Treas. Reg. § 1.263A-1T(b)(2) (requirement that certain costs be capitalized as part of taxpayer's inventory).

capital asset,[16] thereby encouraging other courts to import into the IRC an economic choice that Congress has thus far consistently rejected, despite repeated calls for such tax policy changes by commentators.[17]

B. The Internal Revenue Code Does Not Guarantee Deductibility.

The mere possibility of a federal income tax deduction under 26 U.S.C. § 404(a)(1)(E) does not mean that it will occur. This Court has long observed that federal income tax deductions are only allowed as a matter of "legislative grace" and that a taxpayer seeking a federal income tax deduction must be able to point to an applicable statute and show that he comes within its terms. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440 (1934). The Fourth Circuit's holding in this case shifts that historic presumption against deductibility in pension plan funding cases, by reading into the carryover provisions of 26 U.S.C. § 404(a)(1)(E) a virtual guarantee of deductibility for pension plan contributions that simply is not there.

As this Court has held in such longstanding tax cases as *New Colonial Ice* and *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943), the In-

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[16] It has been estimated that an expenditure deducted ratably over a 10 year period only has 63% of the value of an expenditure deducted immediately, even when inflation is only 5% per year. Brookings Institution, *Inflation and the Income Tax* at 283, Table 10-2 (H. Aaron ed. 1976).

[17] *E.g.*, Goode, *The Individual Income Tax* 234-238 (Brookings Inst. rev. ed. 1976); Deutsch, *On The Taxation of Life Income*, 3 Pub Fin. Q. 299 (1975); *and* Gimlich, *Economic & Budgeting Effects of Indexing the Tax System*, in Brookings Institution, *Inflation and the Income Tax* (H. Aaron ed. 1976). *See also* Note, *Inflation and the Federal Income Tax*, 82 Yale L.J. 716 (1973).

ternal Revenue Code has never guaranteed a federal income tax deduction to any taxpayer. Even if tax deductibility under the IRC could be assumed, 26 U.S.C. § 404(a)(1) would be an especially poor candidate for any such assumption, because of its structure and the unique uncertainties surrounding the funding of defined benefit pension plans. By its terms, 26 U.S.C. § 404(a)(1)(E) makes clear that excess pension plan contributions carried over to future tax years must satisfy all of the applicable deductibility conditions in those future tax years, in order to be deductible at that later time:

> (E) Carryover—Any amount paid in a taxable year in excess of the amount deductible in such year under the foregoing limitations *shall be deductible in the succeeding taxable years* in order of time *to the extent of the difference between the amount paid and deductible in each such succeeding year and the maximum amount deductible for such year under the foregoing limitations.*

26 U.S.C. § 404(a)(1)(E) (emphasis added).

At least three reasons exist why the carryovers generated by the contributions assumed to be deductible by the Fourth Circuit in this case almost certainly will never be "allowable as deductions." First, the contributions are to be made to a plan that is grossly overfunded, through the combination of the deductibility limits imposed by 26 U.S.C. § 412(c)(7) and the lack of additional benefit accruals under the Plan.[18] Second, the contributions are to be made to

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[18] For a defined benefit plan such as the Plan, the deductibility

an overfunded plan that was terminated by reason of a "mass withdrawal" by the Clubs three years ago.[19] Third, the contributions are to be made to a plan that may have already lost its tax-qualified status.[20]

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limits under 26 U.S.C. § 404(a)(1)(A) directly depend upon the plan's "funded" status under 26 U.S.C. § 412, which in turn rely on the various funding assumptions identified by this Court in *Mead Corp. v. Tilley*, 490 U.S. 714 (1989). In this case, where no additional benefits are accruing (and no additional Plan liabilities are being generated, other than through changes in investment performance and actuarial experience) even as Plan assets continue to be invested on a fully tax-sheltered basis, the Plan's "overfunded" status under Section 412 is unlikely ever to change.

[19] As part of the Multiemployer Pension Plan Amendments Act of 1980, Congress devised a procedure whereby multiemployer pension plans automatically terminate if their source of funding—contributions by the employers who are party to the various collective bargaining agreements—is completely shut off as a result of a simultaneous termination by those employers of their funding obligations. This procedure, found at ERISA § 4041A, 29 U.S.C. § 1341a, is known as a "mass withdrawal." Such a procedure, when it occurs, automatically triggers a multiemployer pension plan's termination as a matter of law. The mass withdrawal which occurred in 1989 (when the Clubs implemented their final offer to the NFLPA) caused the funded status of the Plan to "lock in" as permanently overfunded, thus freezing the Plan's funded status under Section 412 and locking the Clubs out of a tax deduction under 26 U.S.C. § 404(a)(1)(A), notwithstanding Section 404(a)(1)(E). *See* 26 U.S.C. § 412(j) and Treas. Reg. §§ 1.404(a)-6(b) and 1.404(a)-7(b).

[20] Section 404(a)(5), 26 U.S.C. § 404(a)(5), specifically addresses the question of whether contributions made to a defined benefit pension plan that is not tax-qualified are deductible. That Section specifically provides that contributions made to a plan that is not tax-qualified may be deducted in the taxable year in which an amount attributable to the contribution is includable in the gross income of employees participating in the plan, "but, in

In the face of such statutory and regulatory obstacles, the Fourth Circuit's reading of Section 404(a)(1) is fundamentally at odds with basic principles of Internal Revenue Code interpretation. The Fourth Circuit's analysis hinges upon the assumption that any pension contribution required to be capitalized under 26 U.S.C. § 404(a)(1) is guaranteed deductibility under 26 U.S.C. § 404(a)(1)(E)—an assumption that is simply wrong.

C. The Fourth Circuit's Decision Will Have Significant Impact On IRC Section 404 And On Other Federal Statutes.

The Fourth Circuit's reading of Section 404 will have a significant impact on federal tax policy in the area of pension plan funding. The Internal Revenue Service has traditionally interpreted the term "deductible under Section 404 of the Code" as meaning *current* deductibility—not eventual deductibility—by permitting contributions conditioned upon their deductibility under Section 404 to be returned to a contributing employer in the event of the disallowance of the claimed deduction.[21] Upholding a reading of deductibility that equates "allowable as deductions"

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the case of a plan in which more than one employee participates *only if separate accounts are maintained for each employee.*" (Emphasis supplied). Since the Plan is a defined benefit plan in which more than one employee participates and for whom separate accounts are not maintained, the Clubs would permanently lose their right to a federal income tax deduction for the disputed contributions, if the Plan were to lose its tax-qualified status while those contributions remain nondeductible.

[21] *Rev. Rul.* 77-200, 1977-1 C.B. 98, *superseded by Rev. Rul.* 91-4, 1991-1 C.B. 57.

with *eventual* deductibility under 26 U.S.C. § 404(a)(1)(E) will enable the IRS to construe the term "disallowance" to embrace only the eventual disallowance of a tax deduction, after a taxpayer's complete exhaustion of all carryover opportunities found under 26 U.S.C. § 404(a)(1)(E). Similar results can be expected from the private sector, when plan fiduciaries are customarily asked to return contributions to a plan sponsor based upon the provisions of 29 U.S.C. §1103(c)(2), which include a "deductibility" provision. *E.g., Dumac Forestry Services, Inc. v. IBEW*, 814 F.2d 79, 81-82 (2d Cir. 1987).

Equating "allowable as deductions" with eventual deductibility under 26 U.S.C. § 404(a)(1)(E) would be especially destructive of 26 U.S.C. § 4972, which provides for an excise tax on nondeductible contributions to qualified employer plans.[22] If a contribution were

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[22] In 26 U.S.C. § 4972(c)(1), a "nondeductible contribution" is defined as:

> [T]he sum of—
>
> (A) the excess (if any) of—
>
> (i) the amount contributed for the taxable year by the employer to or under such plan, over
>
> (ii) the amount allowable as a deduction under Section 404 for such contributions (determined without regard to subsection (e) thereof), and
>
> (B) the amount determined under this subsection for the preceding taxable year reduced by the sum of—
>
> (i) the portion of the amount so determined returned to the employer during the taxable year, and
>
> (ii) the portion of the amount so determined deductible under Section 404 for the taxable year (determined without regard to subsection (e) thereof).

considered "deductible" or "allowable as a deduction" so long as it eventually could be deducted, there would *never* be any "nondeductible contributions." Congress hardly could have intended such a result.

The Fourth Circuit's interpretation also potentially affects several other federal statutes, such as ERISA's general fiduciary rules and the IRC's general pension plan excise tax rules. This Court has already observed in a case involving the proper conduct of pension plan fiduciaries under ERISA that it is often unclear when and whether an employer's contribution is "due" under ERISA. In *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), this Court held that the unbridled application of ERISA Section 515 can be "problematic in cases in which there is a good-faith dispute over both the existence and the extent of the employer's liability." *Id.* at 552.[23] Lack of clarity over whether "allowable as deductions" means *immediate* deductibility or *eventual* deductibility will likely provoke additional debate over what constitutes a "good-faith dispute," thus creating needless litigation in the application of 29 U.S.C. § 1145, as well as exposing both the plan fiduciary and the contributing employer to the risk of penalties and excise tax liability, respectively.

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[23] As this Court recognized in *Advanced Lightweight Concrete*, 29 U.S.C. § 1145 was enacted as a special remedy to be used against employers who were delinquent in meeting their contractual obligations to multi-employer pension plans, because a substantial number of employers had failed to make their "promised contributions" on a regular and timely basis. 484 U.S. at 546 n. 12.

Comparable concerns exist over the effect of the Fourth Circuit's reading on the interpretation of 26 U.S.C. §§ 412, 4971 and 4975. Over the last 18 years, Congress has developed an intricate set of interdependent federal excise tax statutes to help regulate the funding of defined benefit plans. Section 4971(a), 26 U.S.C. § 4971(a), for example, imposes a 10% excise tax upon employers that underfund such plans (5% for multiemployer plans), while 26 U.S.C. § 4975 imposes a 5% to 100% prohibited transaction excise tax upon employers for not making contributions to such plans as and when due. By casting into question when and whether a pension contribution conditioned upon its deductibility is "due," the Fourth Circuit's holding would create considerable uncertainty concerning the interpretation and enforcement of such statutes, and would place additional pressure on the calculation of a plan's funded status under 26 U.S.C. § 412.[24]

In short, by forcing the capitalization of employer pension plan contributions, and by equating "allowable as deductions" with potential deductibility that may never be realized, the Fourth Circuit's decision

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[24] The problems created for employers under these statutes can be significant. This Court has been asked this term to review *In re Mansfield Tire & Rubber Co.*, 942 F.2d 1055 (6th Cir. 1991), *petition for cert. filed*, Dkt. No. 91-887 (Nov. 26, 1991), a decision holding that the federal excise tax imposed under 26 U.S.C. §4971 for underfunding a pension plan—one of the tax code sections intertwined with 26 U.S.C. §404(a)(1)—constituted a tax, not a penalty, for bankruptcy priority purposes. Such a holding could have a significant impact upon the general creditors of any debtor in bankruptcy with either an underfunded—or an overfunded—pension plan, since both trigger an excise tax.

produces a result that is unsound from both tax and ERISA standpoints. The consequence of the Fourth Circuit's decision will be to throw into doubt the pension plan contribution obligations of any employer that has conditioned those contributions on their deductibility. The far-reaching effect of the Fourth Circuit's error warrants review and correction by this Court.

II. By Holding That The Trustees Have Broad Implicit Discretionary Authority In The Absence Of Any Language Conferring Such Powers, The Fourth Circuit's Decision Conflicts With Applicable Trust Principles Enunciated By This Court And Other Federal Appellate Courts, All Of Which Mandate A Restrictive Interpretation Of Discretionary Authority Held By Plan Fiduciaries.

The Fourth Circuit committed a second error, involving a critical question of ERISA plan administration, by holding that the Plan's controlling fiduciary body had the discretionary authority to made fundamental changes in the Plan's terms—including changes altering the Clubs' liability under the 1982 CBA—despite the absence of any express language in the Plan conferring such a basic power. The Fourth Circuit's readiness to infer such expansive powers without clear warrant in the Plan language conflicts not only with this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), but also with the approach of other circuits that have insisted, consistent with well-established trust law principles, that plan fiduciaries possess only those powers that the plan's "settlors" clearly intended to confer upon them.

The Fourth Circuit's willingness to infer broad discretion on the part of the Plan's fiduciaries is par-

ticularly anomalous here, since the court's inference of such breathtaking powers rests on mere general language that gives the Board all "necessary" powers incident to the Plan's operation.[25] The Fourth Circuit discerned in such innocuous language that the Board had the discretionary authority to elaborate on the express intentions of the Plan's settlors, and even to supplant those intentions. The Fourth Circuit held that the Board possessed the implicit power to alter (and increase) the level of benefits that the Management Council and the NFLPA had painstakingly negotiated into the 1982 CBA, even though the Plan was specifically amended to remove the Board's authority to set benefit levels and by doing so, to alter the outcome of the parties' collective bargaining. The Fourth Circuit's decision in this case thus untethers all types of fiduciary determinations from their only available moorings: the intentions of the plan's settlors, as embodied in the language of the controlling collective bargaining agreements and the relevant plan instruments.

This Court has addressed in earlier ERISA decisions the relationship between the powers held by an ERISA plan's fiduciaries and the powers held by the plan's settlors. In those cases, the Court has consistently limited the scope of those powers to what the plan settlors clearly intended to confer. In *United*

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[25] The Fourth Circuit's far-reaching presumption is based on Section 8.4 of the Plan, which gives the Board "*all necessary powers* incident to the creation, administration, implementation and operation of the Plan and Trust." (Emphasis added). However, in coming to that conclusion, the Fourth Circuit avoided the question of what the settlors might have considered a "necessary" power in this instance. 943 F.2d at 505.

Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), this Court held that the trustees of a multiemployer plan similar to the one at issue here did not have discretionary authority to increase plan benefits, because the controlling collective bargaining agreement—like the 1982 CBA in this case—had established those benefit levels. 455 U.S. at 574 n. 13.

More recently, this Court in *Firestone* held that an ERISA fiduciary's discretionary authority was limited, in the absence of a clear grant of discretionary authority from the plan's "settlor." In so holding, this Court proclaimed that "ERISA abounds with the language and terminology of trust law;" that ERISA's fiduciary responsibility provisions " 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts,' " 489 U.S. at 110, *quoting* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 11 (1973); and that the authority held by ERISA fiduciaries necessarily depends upon the degree of " 'discretion vested in [the fiduciaries] by the instrument under which they act.' " 489 U.S. at 111-112, *quoting Nichols v. Eaton*, 91 U.S. 716, 724-725 (1875). The Court also specifically pointed out that the amount of discretion held by an ERISA fiduciary under a trust instrument was necessarily " 'determined by the provisions of the instrument as interpreted in light of all of the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.' " 489 U.S. at 112, *quoting* Restatement (Second) of Trusts §4, Comment d (1959).[26]

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[26] Established trust law principles could give considerable di-

Despite their apparent breadth, this Court's prior pronouncements have left an important aspect of the discretionary authority analysis unresolved: whether courts may *presume* that an ERISA fiduciary has discretionary authority, even though that authority has not clearly been granted by the plan's settlors.

In this case, with no attempt to consider the intent of the Plan's settlors as *Firestone* requires, the Fourth Circuit has relied upon general and inconclusive fiduciary language in the Plan's controlling instruments to "presume," by implication, that the Board has the discretionary authority to increase benefits and to exercise other discretionary powers not expressly conferred upon the Board by the parties to the 1982 CBA.[27] Such an approach inevitably minimizes, and

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rection to courts, if this Court were to hold that such principles should be invoked. For instance, Section 186 of the Restatement (Second) of Trusts (1976) generally requires a specific delegation of discretion under the trust instrument in order to support a finding of fiduciary discretion. However, in *Firestone*, this Court noted that ERISA codified only "*certain* principles" of trust law, thus leaving open to judicial interpretation *which* trust principles had been so codified. 489 U.S. at 110 (emphasis added).

[27] The Fourth Circuit's opinion is replete with references to "presumptions" and "implications" in the Plan, which formed the basis for the court's broad conclusion that the Board could raise benefits:

> *Nothing in its plain language prevents*, and much *appears to allow*, increases in player benefits. . . . The *initial presumption*, then, is that the Board's powers include the power to increase benefits.
>
> * * * *
>
> None of the enumerated limitations on the Board's powers *change this presumption*.
>
> * * * *

can even subvert, the settlors' intent as a factor in plan interpretation.

In the process, the Fourth Circuit's approach improperly blurs the line between administrative interpretive decisions and plan design decisions by suggesting that courts can almost always "find" the equitable answer in the documents, so long as the courts are willing to look hard enough.[28] Left unre-

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> Other parts of the Plan as well *seem to indicate* that the Board has the power to increase benefits. . . . By preventing the trustees from increasing benefits beyond the Plan's capacity to fund them, *the provision implies* that benefit increases within the Plan's means are allowable.

943 F.2d at 505 (emphasis added). There can be little doubt that the Fourth Circuit's decision concerning the scope of the Board's discretionary authority was intended to shore up its conclusion that nondeductible contributions had to be made to the Plan, thus giving the Board the unfettered unilateral power to remove conditions placed in the 1982 CBA. As the Fourth Circuit observed: "Increasing benefits would have guaranteed deductibility to the clubs and thus finds support in this provision." *Id.*

[28] Several appeals courts have rejected attempts to characterize plan design decisions as fiduciary decisions. *E.g.*, *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1139 (7th Cir. 1991); *Belade v. ITT Corp.*, 909 F.2d 736, 737-738 (2d Cir. 1990). As the Second Circuit pointedly observed in *Masella v. Blue Cross & Blue Shield, Inc.*, 936 F.2d 98 (2d Cir. 1991):

> If, as Blue Cross argues, discretionary authority to initially establish these terms and conditions of the plan were equivalent to an implicit grant of discretion to interpret the terms once they were established, then every benefit plan would be held to implicitly grant such discretion to the entity that established it. We cannot accept the conclusion that the discretion to establish the terms of a plan is the same as the

solved, the Fourth Circuit's interpretation of ambiguous Plan language in this case would disturb one of the fundamental presumptions underlying this Court's decision in *Firestone*: that in the absence of a clear grant of discretion from a plan's "settlor," a fiduciary's authority is limited, by necessity.

Consistent with this Court's approach in *Firestone* favoring the continued influence of the settlor over the trustee(s), other federal appeals courts have adopted a presumption *against* a finding of discretionary authority under ERISA, which can only be overcome by clear plan and trust language showing that the settlor intended to convey the requisite discretion. *Firestone,* 489 U.S. at 112.

The United States Court of Appeals for the Sixth Circuit, for example, has consistently required evidence of "a clear grant of discretion" before affording deferential review to fiduciary determinations. *Anderson v. Great West Life Assurance Co.*, 942 F.2d 392, 395 (6th Cir. 1991). *See also Perry v. Simplicity Engineering*, 900 F.2d 963, 965 (6th Cir. 1990). The United States Court of Appeals for the Third Circuit recently embraced a similar standard. In *Luby v. Teamsters Health, Welfare and Pension Trust Funds*, 944 F.2d 1176 (3d Cir. 1991), the court rejected the defendant multiemployer plan's argument that the plan "impliedly grant[ed]" the fiduciaries the author-

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discretion to interpret the terms later. Such reasoning would eliminate the *Firestone* distinction between plans that give an administrator or fiduciary discretionary authority to interpret them and those that do not.

936 F.2d at 103.

ity being challenged, even though the plan trustees themselves had plenary authority to promulgate the rules under which that discretion was granted. *Id.* at 1181-1182. As the Third Circuit noted:

> We reject the Fund's argument that because the Declaration of Trust expressly grants Trustees discretion in certain, specified areas, "it is nothing less than absurd to suggest that the same settlors which entrusted broad discretion to the Trustees in all other phases of Fund administration . . . would deny this same discretion in resolving a dispute between [benefit claimants]." Fund Brief at 26. Far from "absurd", we believe that the settlor's express grant of discretion in certain areas of Fund administration and silence as to others strongly supports the conclusion that had the settlors intended to grant Trustees discretionary authority to decide among disputed beneficiaries on a case-by-case basis, they knew how to say so and would have expressly done so.

944 F.2d at 1181. The Fourth Circuit's analysis in this case is in conflict with the position taken by the Third and Sixth Circuits, as well as by this Court in *Firestone*.

The potential impact of the Fourth Circuit's decision on this Court's holding in *Firestone* cannot be gainsaid. By embracing a presumption of discretion based only on ambiguous Plan language, the Fourth Circuit has stated that the Board in this case has the "presum[ed]" discretion to change participants' Plan benefits virtually at will, in the absence of "specific" prohibitions or restrictions. 943 F.2d at 505. Such a

holding not only stands *Firestone* on its head, but renders this Court's teachings in *Firestone* largely irrelevant to the adroitly designed plan. An ambiguous, general grant of discretion can now be used by a plan's fiduciaries to change the plan's fundamental ground rules, thereby insulating themselves from *Firestone*-type challenges to their authority to interpret the plan's rules or to apply the plan's rules to factual situations. Even commentary that favors the use of implied discretion concedes that "*Bruch* invites continued litigation concerning whether [discretionary] authority can be implied."[29]

In addition to showing plan fiduciaries the way around *Firestone*, the Fourth Circuit's presumption in favor of fiduciary discretion simply cannot be reconciled with *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-74 (1982), or with other decisions of this Court which signal a continuing role for the settlor in the design and maintenance of a multiemployer pension plan after ERISA. In *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 566-68 (1985), for example, this Court relied heavily on established trust law principles in holding that the multiemployer pension plan trustees in that case had the right and power under the express terms of the trust instrument to conduct audits of contributing employers' payroll-related books and records, but only because the power to conduct such audits was clearly specified in the trust's governing instruments.

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[29] Beaver, *The Standard of Review in ERISA Benefits Denial Cases After Firestone Tire & Rubber Co. v. Bruch: Revolution or* Déja Vu?, 26 Tort & Ins. L.J. 1, 25-26 (1990).

Thus, this Court's opinion in *Firestone* can only reasonably be read as setting up a broad presumption *against* a finding of discretionary authority on the part of ERISA plan fiduciaries—regardless of a plan's structure—in the absence of clear evidence that the plan's settlors had granted the requisite discretionary authority to the fiduciaries in question under "established principles of trust law." 489 U.S. at 115.

Any alternative reading of *Firestone* would put the trustee in the position to dictate the terms of the trust to the settlor in direct contravention of all settled trust law principles. Such a reading would vest multiemployer plan trustees with the implied discretionary authority to rewrite the collective bargaining agreement negotiated by the very parties that established the plan's fundamental terms. That is precisely what the Fourth Circuit's decision has allowed the Player Trustees to accomplish in this case. The level of Plan benefits was expressly negotiated as a part of the 1982 CBA, and the Plan pointedly omitted the power, granted to the Board under earlier plans, to determine the level of those benefits. The Board's new-found discretion under the Fourth Circuit's decision to increase benefits, however, has enabled the Player Trustees to achieve through plan administration what they could not gain through collective bargaining.

Such powers are inconsistent with the role of plan trustees, who are not parties to the underlying collective bargaining agreement and generally are not bound by its contractual limitations. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984). Armed with such powers, multiemployer pension plan fiduciaries would have the authority to use ERISA's

and the Code's funding rules and excise tax provisions to change unilaterally an employer's overall obligations under a collective bargaining agreement, as the Player Trustees have sought to do in this case—a result obviously not contemplated by this Court in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545-549 (1988). In fact, such a result may have already been adopted by the Seventh Circuit. *See Martin v. Garman Const. Co.*, 945 F.2d 1000, 1004-06 (7th Cir. 1991) (employer held not to have committed unfair labor practice by ceasing to make pension contributions after bargaining impasse was reached, but still held liable to make the pension contributions being pursued by "Taft-Hartley" trustees).

The Fourth Circuit's flawed analysis in this case could be taken by other courts as a sign that multiemployer pension plan trustees have a duty under ERISA to demand extra-contractual contributions from employers (*i.e.*, through unilateral amendments either removing conditions precedent or increasing plan benefits and obligations) in order to maximize participants' and beneficiaries' potential plan rights, without regard to the intent of the parties in the collective bargaining process. Accordingly, this Court should reaffirm that the trustees of an ERISA plan have only those powers which have clearly been conveyed to them by the plan's settlors. This principle would provide lower courts with criteria for applying *Firestone*'s precepts, and would prevent cases like this one from recurring, in which the Fourth Circuit has permitted the Player Trustees to dictate from the sidelines the final score in the collective bargaining process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals,
Fourth Circuit.

William V. Bidwill, et al.

v.

National Football League Management Council, et al.

Nos. 91-2308 to 91-2310

Argued May 8, 1991.

Decided Aug. 30, 1991.

Lee Thomas Ellis, Jr., Baker & Hostetler, College Park, Md., argued (Jeffrey Pash, Covington & Burling, Washington, D.C., Sargent Karch, Leonard H. Freiman, Douglas E. Lee, Baker & Hostetler, Washington, D.C., George Beall, Hogan & Hartson, Baltimore, Md., on the brief), for plaintiffs-appellants.

Joseph Andrew Yablonski, Yablonski, Both & Edelman, Washington, D.C., argued (Daniel B. Edelman, John F. Colwell, Yablonski, Both & Edelman, Washington, D.C., Robert V. Atmore, Luke H. Terhaar, Lindquist & Vennum, Minneapolis, Minn., on the brief), for defendants-appellees.

Before WILKINSON, Circuit Judge, CHAPMAN, Senior Circuit Judge, and HILTON, District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

WILKINSON, Circuit Judge:

This case arises from a protracted dispute among trustees of a pension plan for professional football players. The trustees chosen by the football players and those chosen by the club owners have been unable to agree on, among other things, the scope of their powers, the interpretation of their authorizing document and the amount of money the clubs owe to the pension fund. The district court held that the football clubs owed some $18 million in delinquent payments to the pension plan and additionally held liable for the same amount the trustees selected by the club owners for breaching their fiduciary duties. We agree that the clubs failed to make their full contributions but we do not believe the conduct of the trustees for the owners constituted a breach of their fiduciary obligations. We thus affirm in part and reverse in part the judgment of the district court.

I.

This controversy revolves around the Bert Bell National Football League Player Retirement Plan, a pension and benefit trust for members of the National Football League Players Association. The Plan is structured pursuant to the Taft-Hartley Act, *see* 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act (ERISA), *see* 29 U.S.C. §§ 1001-1461. The Players Association selects three members of the Plan's board while the National Football League Management Council, an organization of NFL team owners, selects another three trustees. The player trustees included a former executive director of the Players Association and two former players. The owner or management trustees included one team owner, a team president and a team executive vice president. The Commissioner of the National Football League is a seventh, but non-voting, member of the Board.

In 1982, the Players Association and Management Council negotiated a new collective bargaining agreement (CBA). The owners agreed to contribute $12.5 million to the Plan each year for five years, "provided that such contributions are allowable as deductions under the applicable provisions of the Internal Revenue Code." The first payment was due on March 31, 1983, and the last was due on March 31, 1987. The CBA also directed the Board to set benefits at enumerated levels. Under the prior CBA, the owners' contributions to the Plan had also been set but the benefit levels were to be determined periodically by the Board to reflect prevailing conditions and actuarial predictions. When the Board first met in 1983, it adopted the preset benefit levels contained in the 1982 CBA, as well as the contribution levels.

Because the Plan's investments during the early 1980's produced greater returns than expected, the Plan became overfunded. In March 1984, the owners paid only $7.5 million into the Plan instead of the planned $12.5 million. The additional $5 million represented funds that the owners believed were not owed because they were not, in the owners' view, immediately deductible under the Internal Revenue Code due to the Plan's overfunded status. *See* 26 U.S.C. § 404(a). Because the Plan contained a nonreverter clause that made all contributions irrevocable, the owners reduced their payment in the belief that if they paid the disputed funds they would be unable to recover them at a later date.

When the Board met the following month, the player trustees moved for full payment of the $12.5 million, for authorization to institute legal proceedings against the clubs for nonpayment, for submission of a ruling request to the IRS that the full $12.5 million was fully deductible when paid, and for an increase in benefit levels in order to eliminate the Plan's overfunded status. According to the player trustees, since the Plan referred only to "deductibility" and not to "current deductibility" and since

contributions which were not immediately deductible could be carried over to future years, the full $12.5 million was due. The owner trustees agreed to seek an IRS ruling but abstained from voting on the other three motions, which consequently failed. The owner trustees stated they did not support the motions demanding payment because they had doubts that the money was actually due; they further did not support the motion to increase benefits because they believed such an action could be taken only through collective bargaining. The Board filed a request for an IRS ruling in September, 1984.

In October 1984, the owners paid the Plan the disputed $5 million plus interest at 6%, the rate specified in the Plan. They did so in order to preserve under the Internal Revenue Code (IRC) their potential right to deductions but they also considered the $5 million an advance partial payment of the contribution due in March 1985. By March 1985, however, the IRS had still not ruled. The clubs initially withheld $6 million of their contributions but later paid that amount to the Plan, again preserving their rights under the IRC, and again designating the payment as an advance towards the next year's contribution. In March 1986 the clubs made no additional payments to the Plan, but promised that if the IRS ruled that all contributions were currently deductible, they would make all necessary payments plus 6% interest. At an August 1986 Board meeting the differences between the two sides remained irreconcilable. The player trustees again introduced motions demanding payment from the owners and authorizing legal action against them. The owner trustees refrained from voting until they could consult with counsel and the meeting was adjourned.

In early 1987, the IRS indicated that the $12.5 million contributions would not be fully deductible in the years they were paid. On March 5, 1987, the management trustees filed a declaratory judgment action in the United States District Court for the District of Maryland seeking judicial

interpretation of the Plan phrase "allowable as deductions." The player trustees counter-claimed, alleging that the management trustees had breached their fiduciary duties under ERISA by failing to act in the best interests of the Plan's beneficiaries. The player trustees also filed suit on behalf of the Plan against the NFL, the Management Council and the twenty-eight individual football teams for the unpaid contributions and interest.

The district court held that the phrase "allowable as deductions" contained no temporal limitations; therefore, since the IRS had ruled that the clubs could carry over excess contributions and deduct them in future years, the full $12.5 million was due each year. The court entered judgment against the clubs in the amount of $17.8 million plus double interest, attorneys' fees and costs. *See* 29 U.S.C. § 1132(g)(2). Later, the court created an escrow account into which the clubs were to pay the disputed contributions. The court did not rule on the fiduciary breach issues pending completion of discovery.

Following discovery, the district court granted summary judgment for the player trustees. The court held that the owner trustees faced inherent conflicts of interest and should have consulted outside counsel in order "to make a scrupulous and independent investigation of their options." The court later held a trial in order to determine what damages to the Plan, if any, had been caused by the management trustees' breach of duty. The evidence at trial consisted largely of expert opinions as to what actions independent counsel would have suggested and what steps a prudent trustee should have taken. The court found that the trustees did have the power under the Plan to increase benefits in an actuarially sound manner and held that the owner trustees had breached their fiduciary duties by not doing so. The effect was to hold the owner trustees liable for the same $17.8 million in unpaid contributions previously assessed against the clubs, plus 12% interest and attorneys' fees. The court also ordered the owner trustees

to increase benefits and appointed a special master to determine the extent of the increases. The court denied, however, the player trustees' other requests for permanent injunctive relief such as removing the owner trustees from the Board.

The management trustees, Management Council and football clubs now appeal.

II.

The clubs first argue that the district court misconstrued the Plan to require payment of the full $12.5 million contribution each year, even when a proportion of the payment would not be deductible in the year it was paid. The controversy surrounds Section 3.2 of the Plan which reads, in part:

> [T]he Employers guarantee that contributions will be paid into the Trust on or before the last day of each Plan Year, provided that such contributions are allowable as deductions under the applicable provisions of the [Internal Revenue] Code.

The clubs assert that this provision obligates them to pay only those contributions that are allowable as deductions when paid. We agree with the district court, however, that the term "allowable as deductions" contains no temporal limitation. Because under the Internal Revenue Code the clubs can carry forward any contributions not deductible in the year they are paid, the Plan requires that the full $12.5 million be paid each year.

The only condition on deductibility that appears in the language of the Plan is that contributions must be deductible under the IRC. Under 26 U.S.C. § 404(a)(1)(E), "[a]ny amount paid in a taxable year in excess of the amount deductible in such year under the foregoing limitations shall be deductible in the succeeding taxable years." Thus, the IRC provides that the full contribution

can be deducted, albeit over a period of time. Because the condition of deductibility in Section 3.2 is satisfied, the contribution is plainly due. Nothing in Section 3.2 suggests that we should read into the Plan a temporal limitation on deductibility, particularly where the sophisticated parties who negotiated its terms failed to include one. When "the principals [are] practiced and represented by counsel, and the contract itself [is] reasonably clear, it is far wiser for a court to honor the parties' words than to imply other and further promises out of thin air." *Mathewson Corp. v. Allied Marine Indus., Inc.*, 827 F.2d 850, 856 (1st Cir. 1987); *see Clark v. Ryan*, 818 F.2d 1102, 1106 (4th Cir. 1987).

The clubs complain that this interpretation of Section 3.2 leads to an anomalous result when combined with the nonreverter clause in Section 3.6 of the Plan. Under that clause, all payments to the Plan "shall represent irrevocable contributions and can never revert to or be enjoyed by the Employers or the League." The clubs maintain that if they are unable to use excess deductions in the future, they will never be able to recover their contributions and will have overpaid what they owed under Section 3.2.

We disagree. It is not dispositive that the clubs may be unable to use carryover deductions in the future. The Plan provision turns on whether deductions are allowable, not whether they are actually used. When the Plan is not overfunded, the full $12.5 million is unquestionably due; a given club must pay its share whether or not its financial condition permits it actually to use the corresponding deduction. For example, a football team that was losing money might be unable to claim fully its contribution as a deduction; yet it must still contribute its full share. As the clubs themselves recognize in their brief, "[a] contribution not in excess of deductible limits is allowable as a deduction regardless of whether a particular employer that must contribute to a plan enjoys a tax benefit from the deduction. . . . the clubs never have conditioned their con-

tribution obligation on each club's receipt of a tax benefit." Whether a given financial expenditure is thus allowable as a deduction and whether the deduction is actually used are separate issues. It is unclear why the question of whether the $12.5 million is due would turn on whether the clubs can actually use the deduction when the Plan is overfunded, but not in other circumstances.

Secondly, as the district court observed, if only immediately deductible contributions were owed under Section 3.2, then the need for a nonreverter clause would be diminished because the clubs would not have cause to request a refund. It may be precisely because the full $12.5 million might not be fully deductible each year that the nonreverter clause is present. We need not determine the precise purpose of Section 3.6, however, to conclude that its presence does not diminish and may strengthen the plain language in Section 3.2

Finally the clubs argue that Section 3.2 is ambiguous and that the district court should have considered extrinsic evidence of the parties' intent. *See Southern Bell Tel. & Tel. Co. v. Florida E. Coast Ry. Co.*, 399 F.2d 854, 856 (5th Cir. 1968). Even if we believed that Section 3.2 was ambiguous, there would be problems with the clubs' position. The history of Section 3.2, recited by the clubs in their brief, is not related to immediate deductibility. Rather there was a fear during the 1977 collective bargaining sessions that the Plan would lose its tax-qualified status because it had not been funded for the two previous years. Historically, then, Section 3.2 was a safety valve to protect the owners from having to make contributions to a Plan that lost its exempt status. There is no indication that the parties intended the provision to decrease promised contributions to a Plan whose tax-exempt status was not in question.

We therefore affirm the judgment of the district court that the clubs owe the Plan $17.8 million in unpaid con-

tributions. We also affirm its dispositions with respect to interest and attorneys' fees.

III.

The owners protest that our reading of Section 3.2 will result in a continually overfunded Plan and that the parties never intended such a circumstance. That argument presumes, however, that the Board has no power to distribute assets to the Plan's beneficiaries. In this section we discuss the Board's powers under the terms of the Plan, in particular, its ability to increase benefits. We conclude that the Board has such authority and that exercise of that power would largely resolve the problem of which the clubs complain. We believe, however, that in the absence of a fiduciary breach, it is for the trustees and not for the courts to determine the extent of any benefit increase, and we therefore vacate the district court's orders assuming those trustee prerogatives.

Our inquiry begins with the Plan itself. Nothing in its plain language prevents, and much appears to allow, increases in player benefits. As an initial matter, the Plan gives the trustees broad discretionary powers. Section 8.4 specifies that the Board "shall have *all* necessary powers incident to the creation, administration, implementation and operation of the Plan and Trust." (emphasis added). Section 8.13 further provides that "[w]henever in this Plan and Trust discretionary powers are given to the Retirement Board, it shall have the *broadest* discretion permitted under the Act [ERISA]." (emphasis added). This is expansive language that invests the trustees with authority to take a wide variety of actions. The initial presumption, then, is that the Board's powers include the power to increase benefits.

None of the enumerated limitations on the Board's powers change this presumption. Section 8.5 of the Plan explicitly lists a number of actions that the Board is forbidden

to take. Notably absent from the Plan is any prohibition on increasing benefits. The lack of any such restriction is significant against the backdrop of the broad powers accorded the trustees. The absence of a restriction is also notable because the parties have demonstrated that where they did intend to limit the powers of the trustees, they were quite capable of doing so. Specific prohibitions were placed in Section 8.5, for example, on the trustees' ability to alter contribution levels and to decrease benefits. The absence of a similar restriction on increasing benefits must mean that no such limitation was intended.

Other parts of the Plan as well seem to indicate that the Board has the power to increase benefits. For example, Section 8.5(E) prohibits the Board from amending the Plan in a way that is actuarially unsound. Since the Board cannot change contribution levels and cannot reduce benefits, this provision must operate to guide the trustees' discretion in raising benefits. By preventing the trustees from increasing benefits beyond the Plan's capacity to fund them, the provision implies that benefit increases within the Plan's means are allowable. Also, Section 8.5(B) provides that the Board shall take no action to "cause any portion of contributions to the Plan [to] fail to be deductible to the Employers." Increasing benefits would have guaranteed deductibility to the clubs and thus finds support in this provision.

Our interpretation of the Plan is also guided by ERISA, for "trust documents must generally be construed in light of ERISA's policies." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568, 105 S.Ct. 2833, 2839, 86 L.Ed.2d 447 (1985); *see* 29 U.S.C. § 1104(a)(1)(D). It should be clear that ERISA was enacted to protect the interests of employees and their dependents. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). The Act thus directs trustees to discharge their duties "solely in the interest of the participants and be-

neficiaries" and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1). In order to ensure achievement of these goals, "Congress invoked the common law of trusts . . . [under which] trustees are understood to have all 'such powers as are necessary or appropriate for the carrying out of the purposes of the trust.' " *Central States*, 472 U.S. at 570, 105 S.Ct. at 2840 (citing 3 A. Scott, Law of Trusts § 186 (3d ed. 1967). Adding the Act's cardinal purpose of serving beneficiaries to the lack of any limiting language in the Plan itself, we conclude that the trustees here have the power to increase benefits in an actuarially sound manner.

The management trustees argue, however, that by setting actual benefit levels, the 1982 CBA intended to foreclose the Board from increasing benefits under any circumstances. They point out that under the prior CBA and Plan, the trustees had the explicit power to raise benefits—a power which was nowhere expressly conferred in the 1982 agreement. They assert further that the 1982 CBA set benefit levels for the coming years in an attempt to eliminate exchanges between the trustees that had come to resemble collective bargaining; thus, to allow the Board to increase benefits would produce the same collective bargaining over benefit levels that the parties had attempted to avoid. *See United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-74, 102 S.Ct. 1226, 1232-33, 71 L.Ed.2d 419 (1982) (no breach of fiduciary duty in administering trust in accordance with terms of collective bargaining agreement).

We are not persuaded, however. In the first place, it is a settled principle of trust laws that the powers of the trustees are determined by the terms of the trust document. *See* Restatement (Second) of Trusts § 164 (1959). As described above, we believe that document empowers the Board to raise benefits levels within the constraints imposed by the Plan.

Secondly, our holding in *Sinai Hosp. of Baltimore, Inc. v. National Benefit Fund for Hosp. & Health Care Employees*, 697 F.2d 562 (4th Cir. 1982), speaks directly to the circumstances of the trustees' authority when a surplus develops in a fund, and the question arises whether that surplus will be used to reduce employer contributions, to increase employee benefits or to build fund assets by way of investment. In *Sinai Hospital*, a conflict arose between a trust fund document and collective bargaining agreements negotiated between hospital employees and a group of hospitals. Although the employees had agreed in the collective bargaining agreements that benefits were not to be raised for a three year period, the trust agreement authorized the trustees to set benefit levels. When a surplus developed in the trust fund, the trustees elected to increase benefits. This court rejected the argument that the trustees had exceeded their authority because "neither an employer nor a union, singly or together, can alter the terms of a trust instrument . . . unless the power to do so was reserved when the trust was created or properly amended." *Id.* at 567.

If *Sinai* held that the trustees had not exceeded their authority in the face of an express conflict between the trust instrument and the CBA, we think it all the more apparent that they would not do so here where no conflict is present. The management trustees' argument based on the 1982 CBA is weaker here than was the hospitals' argument in *Sinai*. There, the CBA explicitly prohibited benefit increases, whereas here the CBA simply set benefit levels without reference to future increases or decreases. The 1982 CBA thus does not advance management's argument because it no more explicitly limits the trustees' power to increase benefits in an actuarially sound fashion than does the Plan. Indeed, the district court found that the parties had intended the benefit levels to be simple minimum guarantees, rather than absolute limits.

Finally, we note that if the Board had increased benefits, then the entire controversy surrounding the interpretation of "allowable as deductions" might have been avoided. The Board might have ensured that the full $12.5 million was currently deductible by increasing benefits in an actuarially sound manner in order to diminish the surplus. *See* Plan § 8.5(B) ("No action of the Retirement Board shall . . . cause any portion of contributions to the Plan [to] fail to be deductible to the Employers"). The owners would have paid no more than they had agreed to in collective bargaining and would have been able to deduct the full contributions. The beneficiaries of the trust would have profited in keeping with the purposes of ERISA. Such an outcome only reinforces our conclusion that the trustees have the power to increase benefits.

Although we thus hold that the trustees possess the authority to raise benefits, we think it an unwarranted interference with the trustees' powers to direct the particulars of such an increase. The district court, upon holding that the management trustees breached their fiduciary duties, appointed a special master to determine what would be actuarially sound benefit increases. Because we hold in the following section that no fiduciary breaches took place, we think that course of action unwarranted.

An appointment of a special master to mandate specified benefit actions injects the courts too much in the administration of the Plan. It would be inconsistent to recognize the broad discretion accorded ERISA trustees, here including the power to raise benefits, while simultaneously removing that authority by compelling the trustees to exercise that discretion in a particular fashion. Absent a finding of a fiduciary breach, no need for a special master arises. Such an appointment would additionally move beyond *Sinai*, which held only that the trustees did not exceed their power in choosing to raise benefits. While the prerogative of the trustees to raise benefits is clearly es-

tablished, the implementation of that prerogative properly belongs with the Plan's fiduciaries.

Therefore, although we conclude that the trustees do have the power to increase benefit levels, we vacate the district court's orders which purport to direct the specific exercise of that authority.

IV.

The player trustees have urged finally that the owner trustees should be found personally liable for breaching their fiduciary duties in numerous ways. Although the owner trustees' position as to the scope of their powers has not ultimately persuaded us, we do not believe that their actions were unreasonable so as to give rise to liability. To attempt to resolve a dispute among trustees by seeking an IRS ruling and then judicial interpretation of the Plan documents was a sensible course of action that should not be penalized.

Trustees are charged under ERISA with a duty to discharge their responsibilities "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man . . . would use." 29 U.S.C. § 1104(a)(1)(B). They additionally are required to act "in accordance with the documents and instruments governing the plan." *Id.* § 1104(a)(1)(D). A trustee acts judiciously, then, in hesitantly exercising an ambiguous power. We have found nothing in the management trustees' actions that indicates they acted outside ERISA's parameters.

The initial act of seeking a ruling from the IRS was a prudent first step to resolve the conflict that had developed concerning the interpretation of the deductibility provision. The inquiry centered on the meaning of an IRC section for which the IRS had not yet issued regulations and which might have allowed the clubs to deduct the full $12.5 million each year. Had the IRS ruled the full amount currently deductible, a large part of the dispute would have been

resolved. The Board voted to pursue this course of action with the knowledge that the clubs would pay any amount ultimately found owing to the Plan. The trustees also knew that the NFL Management Council had agreed to extend all time limitations on grievances until after the IRS ruled. Additionally, the trustees knew the Plan was in no danger of being underfunded; the Plan's significantly overfunded status was the root of the controversy. The player trustees have further made no claim that a single promised benefit was withheld. Finally, a review of the transcript of the Board's August 18, 1984 meeting reveals that the player trustees were the group more confident that the IRS ruling would resolve the conflict. In such circumstances they should not be heard to argue that the management trustees breached a duty by failing to take more drastic action at that time.

When the IRS ruling did not resolve the issue of how much money was due the Plan, the owner trustees sought a declaratory judgment on that very point. Rather than immediately commencing lawsuits demanding payment from each of the clubs, they chose to determine first whether the clubs actually owed the money to the Plan. They agreed at Board meetings with the player trustees that if the money was owed, then the Board had a duty to obtain it. *See Kim v. Fujikawa*, 827 F.2d 1401, 1404 (9th Cir. 1987). We cannot imagine that seeking first to ascertain the extent of the owners' possible underpayment would subject the trustees to personal liability. If the money had not been owed, then further collection actions would have been an inappropriate use of the Plan's resources. *See McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986) (no breach of fiduciary duty for refraining from bringing an imprudent action).

Nor was failing to increase benefits an error punishable by personal liability. A trustee who was aware of the 1982 collective bargaining sessions and the modification of the Plan to delete the authorization to raise benefits might

well have concluded that the Board had no power to raise benefits and that it had no business doing so. We disagree with that conclusion, but our opinion should not be read to preclude the possibility of a prudent trustee believing otherwise. Furthermore, the Plan granted the trustees the power to define and interpret its terms. *See* Plan § 8.4(A). When the governing document explicitly grants such authority, some deference is owed to trustees' interpretation of that document and their powers under it. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989).

The player trustees argue, however, that the management trustees should be held liable because ERISA strictly prohibits conflicts of interest. *See* 29 U.S.C. § 1106(b)(1). "A fiduciary cannot contend 'that, although he had conflicting interests, he served his [several] masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.' " *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981) (quoting *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 269, 61 S.Ct. 493, 497, 85 L.Ed. 820 (1941)). Thus they assert that the owner trustees should be liable because the clubs they worked for stood to benefit by $600,000-$700,000 each if the contributions were not pursued. In support of this position, the player trustees also point to a Department of Labor Opinion which concludes that a trustee of a Taft-Hartley plan who is an affiliate of a delinquent employer and who participates in a decision to defer a delinquent employer contribution engages in a prohibited transaction under ERISA. Dept. of Labor, Pension & Welfare Benefit Programs, Op. 77-91 (April 22, 1977).

This argument is misleading, however. ERISA explicitly permits someone to serve "as a fiduciary" who is also "an officer, employee, agent, or other representative of a party in interest." 29 U.S.C. § 1108(c)(3). This circuit has already rejected the idea that fiduciaries under ERISA cannot be

impartial simply because they have ties to contributors to the plan. *See De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1191-92 (4th Cir. 1989). Moreover, although the existence of a conflict of interest may have relevance to the analysis, it is but one factor to be weighed in determining whether trustees have abused their discretion. *Firestone*, 489 U.S. at 115, 109 S.Ct. at 956; Restatement (Second) of Trusts § 187 comment d (1959). We conclude that this factor does not outweigh the other considerations present here.

The second problem with the player trustees' argument is that it presumes that the funds were due and owing when that issue was precisely what the dispute concerned. The owner trustees agreed with the player trustees that if contributions were owed, the Board had the duty to obtain them. As discussed above, the owner trustees took reasonable steps to resolve the conflict and to determine the clubs' potential liability. This simply is not a case where fiduciaries attempted to write off a clearly owed debt in order to profit themselves.

The player trustees finally argue that the owner trustees breached their fiduciary duties by failing to consult outside counsel when confronted with a conflict of interest. Although the owner trustees did consult an attorney, the player trustees take issue with the fact that the particular attorney represented the NFL Management Council as well as the Plan. The district court agreed with that view and imposed a duty to consult independent counsel. *See also McMahon v. McDowell*, 794 F.2d 100, 110 (3d Cir. 1986) (fiduciary may have duty "to seek the guidance of a neutral third party").

We do not believe the owner trustees violated any fiduciary duties by relying upon an attorney who was also co-counsel for the Plan, however. Nothing in ERISA explicitly requires that outside counsel invariably be consulted. Indeed, ERISA specifically allows individuals with close ties to employers to serve as trustees. *See* 29 U.S.C.

§ 1108(c)(3). Had Congress intended that such people be allowed to serve as trustees only on the condition that they consult outside counsel, it would have been a simple task to have said so. The Third Circuit also reached this conclusion in *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1531-32 (3d Cir. 1988). In *Ashenbaugh*, the board of the pension plan was composed solely of officers of the employer and was advised by the employer's counsel. *Id.* at 1519 & n. 2. The court refused to impose a duty to hire independent counsel to help the committee interpret and administer the plan. Here, where the nature of the conflict of interest is precisely that already allowed by ERISA, and where the trustees have acted prudently, we decline to find a breach of fiduciary duty by failing to consult outside counsel.

The owner trustees acted cautiously and in hopes of avoiding fruitless litigation. We believe they acted properly in seeking a ruling from the IRS followed by a judicial declaration of the meaning of the Plan. Because they reasonably discharged their fiduciary duties under ERISA, we reverse the district court's holding that those duties were violated.

V.

To summarize, we hold that the full $12.5 million contribution was due each year under the terms of the Plan. We further hold that it is within the trustees' powers to raise benefits under the Plan in an actuarially sound manner. Finally, we believe the owner trustees did not proceed in disregard of their fiduciary duties. The judgment of the district court is therefore

AFFIRMED IN PART, REVERSED IN PART.

APPENDIX B

U.S. District Court,
District of Maryland

William V. Bidwill, et al.
v.
National Football League, et al.

Civil Nos. HM-87-509 and HM-87-698,
July 22, 1988

Lee T. Ellis Jr., Sargent Karch, Leonard Freiman, and Kevin Fast, of Baker & Hostetler, of Washington, D.C., George Beall, of Miles & Stockbridge, of Baltimore, Md., and Jeffrey Pash, of Covington & Burling, Washington, D.C., attorneys for Bidwell, et al. in Civil No. 87-509, attorneys for National Football League in Civil No. 87-698.

Joseph A. Yablonski and John F. Collwell, of Yablonski, Both & Edelman, of Washington, D.C., and Robert V. Atmore and Luke H. Terhaar, of Lindquist & Vennum, of Minneapolis, Minn., attorneys for Garvey, et al., in Civil No. 87-509, attorneys for Condon, et al., in Civil No. 87-698.

MURRAY, District Judge.

The above-captioned consolidated cases turn on the interpretation of a clause in a collective bargaining agreement. The factual and procedural history of these cases is rather complex.

On December 11, 1982, the National Football League Players Association ("Players"), on behalf of the players in the National Football League ("NFL"), and the NFL Management Council ("Managers"), on behalf of the 28

NFL Clubs, entered into a five-year Collective Bargaining Agreement ("Agreement"). Among other things, the Agreement provided for the continuation and maintenance of the NFL players pension and benefit trust, the Bert Bell NFL Player Retirement Plan ("Plan"), a duly-qualified pension trust under § 401(a) of the Internal Revenue Code ("IRC"), 26 U.S.C. § 401(a).

Article XXXIV of the Agreement obligates the NFL Clubs to make contributions to the Plan in each of the five years covered by the Agreement, in accordance with a specified schedule, in a total amount of $12,500,000 per year. The clause that is at the heart of this dispute is located in Article XXXIV, Section 2 of the Agreement, and provides: "Contributions will be paid into the Trust on or before the last day of each Plan Year, provided that such contributions are allowable as deductions under the applicable provisions of the Internal Revenue Code." In the same paragraph, the Agreement provides: "It will be the duty of the Retirement Board to pursue all available legal remedies in an effort to assure payment of all contributions due under this Agreement." The Retirement Board is charged with the administration of the Plan. It is composed of three members designated by the Managers ("Management-Trustees") and three members designated by the Players ("Player-Trustees"). The Commissioner of the NFL is a non-voting member and the designated chair of the Retirement Board.

The NFL, on behalf of its member Clubs, contributed $12,500,000 to the Plan for the Plan Year[1] ending March 31, 1983. In January of 1984, co-actuaries of the Plan[2]

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[1] The five "Plan Years" run from April 1, 1982 through March 31, 1987. Thus, contributions from the Club under the Agreement were due on March 31, 1983, 1984, 1985, 1986, and 1987.

[2] Under Article XXXIV, Section 7 of the Agreement, "[t]here shall be co-actuaries to advise the Board, one designated by the NFLPA and the other designated by the Management Council."

determined that the Clubs might not be able to deduct a portion of this sum for the year in which the contribution had been made. In 1984, the Managers informed the Players and the Retirement Board that the Clubs would contribute only $7,436,700 to the Plan for the Plan Year ending March 31, 1984. Letter from J. M. Donlan to Eugene Upshaw (March 30, 1984). The Managers explained that according to actuarial calculations, the $12,500,000 contribution made on March 31, 1983 exceeded the amount deductible for that year by $3,563,300 and that the $12,500,000 due on March 31, 1984 would exceed the currently deductible amount by $1,500,000. Thus, for the two Plan years, the Managers concluded that there was a total of $5,063,300 that was not currently deductible. This total was therefore deducted from the $12,500,000 due on March 31, 1984.

Three weeks later, the Retirement Board convened. The Player-Trustees objected to the Managers' theory that the obligation of the Clubs to contribute to the Plan was limited by what was currently deductible (*i.e.*, deductible for the same tax year in which it was made). Bert Bell NFL Player Retirement Plan, Retirement Board Meeting, Transcript of Proceedings at 117-120. The Player-Trustees proposed that the Board adopt a number of Resolutions in response to the failure of the Clubs to contribute the full $12,500,000: (1) that the Board demand immediate payment, with interest, of the $5,063,300 which had been withheld from the March, 1984 payment; (2) that the Board authorize legal action to recover the unpaid sums; (3) that Plan benefits be increased to assure current deductibility of contributions; and (4) that a ruling on the deductibility of the contributions be sought from the IRS. *Id.* at 120-23, 142-44. Because the Management-Trustees abstained from voting on the first two Resolutions, *id.* at 125-26, and voted "no" on the third, *id.* at 143-44, these Resolutions did not pass. The fourth Resolution, seeking an IRS letter ruling, was adopted unanimously. *Id.* at 142. A

request for a private letter ruling was filed with the IRS on September 10, 1984. A month after the request was filed, the Managers informed the Players and the Retirement Board that the amount withheld from the March, 1984 Plan contribution was being remitted to the Plan with accrued interest at the rate of 6 percent from April 1, 1984, for a total amount of $5,337,013.37. Letter from J. M. Donlan to Eugene Upshaw (October 10, 1984). The Managers indicated that in the event of an unfavorable IRS letter ruling (*i.e.*, a ruling that the amount of the March, 1984 contribution deductible for that year was only $7,436,700), the payment was designated as an advance partial contribution of the contribution amount due on March 31, 1985.

On March 27, 1985, the Managers informed the Players and the Retirement Board that they believed that only $11,750,000 of the $12,500,000 due March 31, 1985 would be currently deductible. Letter from J. M. Donlan to Eugene Upshaw (March 27, 1985). They said that they would pay $6,522,986.63 to the Plan on March 29, 1985, this amount representing the "currently deductible amount of $11,750,000 less the $5,227,013.37 advance partial contribution made" the previous October. They also said the Clubs would pay $5,977,013.37 to the Plan on April 1, 1985, this amount representing the difference between $12,500,000 and the March 29th payment, and designated as an advance partial payment of the contribution due on March 31, 1986 in the event of an unfavorable IRS ruling.

The Player-Trustees rejected the characterizations and qualifications that the Managers put on the various payments.

On March 26, 1986, the Managers informed the Players and the Retirement Board that no payment, other than the $5,997,013.37 sum paid on April 1, 1985 and designated as an advance partial payment, would be made to

the fund on March 31, 1986.[3] On April 11, 1986, the Players demanded that the Managers pay $12,500,000 to the Plan for the year ending March 31, 1986. Letter from Eugene Upshaw to Jack Donlan (April 11, 1986). On August 21, 1986, the Player-Trustees proposed that the Retirement Board adopt Resolutions to demand payment in full from the Clubs and to commence litigation to recover the sums. Bert Bell NFL Player Retirement Plan, Retirement Board Meeting, Transcript of Proceedings at 74-76 (August 21, 1986). These Resolutions did not pass, apparently because the Manager-Trustees declined to vote on them until they had conferred with counsel. *Id.* at 77.

On March 5, 1987, William Bidwell, James Kensil, and Michael Lynn, the Management-Trustees, commenced an action in this Court against Edward R. Garvey, Tom Condon, and Dan Jiggets, the Player-Trustees, for a declaratory judgment on the issue of whether certain sums were due to the Plan under the Agreement. This action bears docket number HM-87-509. On March 27, 1987, the Player-Trustees filed an answer to the complaint and a counterclaim that alleged breach of fiduciary duty by the Management-Trustees. In addition, the Player-Trustees instituted a separate action, Civil No. HM-87-698, against the Managers, the NFL and its 28 constituent Clubs. This action sought payment of the amounts by which the Clubs' contributions to the Plan fell short of $12,500,000 per year, interest, and attorneys' fees.

After the actions were commenced, the Clubs made another payment to the Plan on March 31, 1987, in the amount of $7,151,839.63.

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[3] They also claimed additional credit in the amount of $875,100 toward their March 31, 1986 contribution obligation, on the grounds that the amount currently deductible for the Plan Year ending March 31, 1985 had turned out to be $10,874,900, rather than the amount of $11,750,000 previously estimated.

The IRS finally issued the requested letter ruling on July 31, 1987. The IRS opined that contributions to the Plan in excess of the deductibility limitations set forth in 26 U.S.C. § 404(a) would not be currently deductible but could, under 26 U.S.C. § 404(a)(1)(D)[4] be carried over and deducted in subsequent taxable years subject to the deductible limits for such years.

Because they concern common issues of fact and law, these cases were consolidated for all purposes.

Presently pending are a number of pretrial motions. The Player-Trustees have moved for partial summary judgment on Count 1[5] of their complaint in Civil No. HM-87-698. The defendants in that case (hereinafter collectively referred to as "the Management parties"), filed a memorandum in opposition to the motion and cross-moved for summary judgment on all outstanding claims. The Player-Trustees replied to the opposition and responded in opposition to the cross-motion for summary judgment. In addition, they filed a separate opposition to the Management-Trustees' motion for summary judgment on the breach-of-trust claims made by the Player-Trustees in their counterclaim in Civil No. HM-87-509. The NFL Management parties replied to the opposition, the Player-Trustees sur-replied, and the NFL Management parties filed a sur-reply to the sur-reply. For its part, the NFL has adopted

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[4] This provision is now recodified as 26 U.S.C. § 404(a)(1)(E).

[5] Count 1 is brought under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and is for contributions allegedly due to the Plan and withheld in violation of 28 U.S.C. § 1145. Counts 2 and 3 of the complaint alleged common law breach of contract and breach of trust; they, along with Count 3 of the Player-Trustees' counterclaim, which also alleged common law breach of trust, have previously been dismissed by this Court on pre-emption grounds. *See Memorandum and Order* (July 20, 1987).

the arguments and evidentiary materials submitted by the NFL Management Council and its 28 member Clubs.[6]

In addition to the motion for partial summary judgment, the Player-Trustees have moved to dismiss the Management-Trustees' declaratory judgment action. The Management-Trustees have opposed this motion.

The Court has considered the above motions and filings and has heard oral argument on the cross-motions for summary judgment. The Court is now prepared to rule. The Court's jurisdiction in this matter is conferred by 29 U.S.C. § 1132(e)(1).

All parties agree that the essential issue in this case is the meaning of the clause in Article XXXIV of the Agreement, which obligates the Clubs to contribute $12,500,000 to the Plan for each Plan Year "provided that such contributions are allowable as deductions under the applicable provisions of the Internal Revenue Code." The argument of the Player-Trustees is straightforward. They argue that the "allowable as deductions" language carries no temporal limitation and that because the Internal Revenue Code allows the Clubs to carry forward contributions that are not currently deductible in the year when made into subsequent years, the contributions are "allowable as deductions" and therefore due. They contend that the "allowable as deductions" language is unambiguous and that the Court must find its meaning within the "four corners" of the Agreement.

The Management parties argue alternatively. They contend that the meaning of the "allowable as deductions" language may be determined from the four corners of the contract, but that the entire contract includes the provi-

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[6] The NFL was made a party to this case because of its status as the umbrella organization of its 28 constituent member Clubs and because it holds money of the Clubs in reserve pending the outcome of this litigation.

sions of the Bert Bell NFL Player Retirement Plan. They argue that when the Agreement and the Plan are read *in pari materia*, the only sensible interpretation of the "allowable as deductions" provision is that deductions must be allowable in the year when made. They further contend that their interpretation of the provision was endorsed by the Player-Trustees in the request for a letter ruling submitted to the IRS. In the alternative, the Management parties contend that the dispute over the meaning of the contractual provision raises genuine issues of material fact, precluding summary judgment.

The Court finds no need to consider parol evidence in this case because there is no ambiguity in the disputed contractual provision. It is error for a Court to admit parol evidence when the disputed language is neither ambiguous nor uncertain. *Clark v. Ryan*, 818 F.2d 1102, 1105 (4th Cir. 1987). The Agreement in this case is an integrated contract. Article II, Section 1 provides: "This Agreement represents the complete understanding of the parties on all subjects covered herein." As such, summary judgment is an appropriate mode of resolving disputes under the Agreement. *See National Electrical Contractors Ass'n, Inc. v. National Constructors Ass'n*, 678 F.2d 492, 499 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1233, 1234 (1983).

The "allowable as deductions" language could hardly be clearer. It plainly states that contributions are due to the extent that they are allowable as deductions under the Internal Revenue Code. There is no temporal limitation on this language. Certainly, if the parties to the contract intended the temporally restrictive meaning ascribed to the language by the Management parties, they would have written that into the Agreement. *Cf. Interstate Fire & Cas. Co. v.* [*Pacific Indem. Co.*, 568 F. Supp. 633, 637 (D. Md. 1983) (Harvey] J.) (if parties to insurance policy had intended "injury" to mean personal injury, more precise terms would certainly have been used). There is simply

nothing in the language of the Agreement to indicate that "allowable as deductions" means other than what it says.

Even when the Agreement is read *in pari materia* with the terms of the Plan, the result does not change. The Management parties contend that section 3.6 of the Plan, which provides that all amounts contributed by the Clubs to the Plan are irrevocable and can never revert to the Clubs, makes their reading of the "allowable as deductions" language the only reasonable one. The argument is that the deductibility of excess contributions that are carried over into subsequent years is only potential. Unless the "allowable as deductions" language is temporally limited to what is currently deductible, the Clubs will be forced to make contributions now that may never be allowed as a deduction and which, consistent with section 3.6 of the Plan, can never be recovered by the Clubs. Thus, according to the argument, the meaning ascribed to the "allowable as deductions" clause by the Player-Trustees is inconsistent with section 3.6 of the Plan and must be rejected on that basis. The Management parties contend that if the Clubs' contribution obligations are confined to what is currently deductible, the issue regarding a return of contributions to the Clubs would never arise because the Clubs could make a current-year determination of deductibility prior to contributing funds to the Plan.

The Court is unpersuaded. Section 404(a)(1)(E) of the Internal Revenue Code puts no limit on the number of years in which deductions can be carried over. Excess contribution by the Clubs can be carried over indefinitely. On the other hand, the Clubs' obligation to make $12,500,000 yearly contributions to the Plan extends only five years. Under these circumstances, it is difficult to understand why the contributions made in the five years covered by the Agreement would not ultimately be deductible.

The Management parties' argument is premised on the assumption that they will be making excess contributions year after year even though the 1982 Agreement extends only five years. That collective bargaining agreements between the Clubs and the Players subsequent to the time covered by the 1982 Agreement may call for excess contributions to the Plan year after year is not germane to the resolution of the contract dispute presented in this case. The only question here is whether the $12,500,000 contributions that the Clubs make during each of the five years covered by the 1982 Agreement are allowable as deductions. The carryover provision of 26 U.S.C. § 404(a)(1)(E) makes clear that the amount of contributions not currently deductible may be carried over and deducted in future years. Whether the Clubs jeopardize their ability to take advantage of these deductions by obligating themselves in other agreements to make excess contributions to the Plan in years following the expiration of the 1982 Agreement is beside the point.

In addition, restricting the contribution obligation of the Clubs to what is currently deductible would not solve the problem posed by the irrevocability of contributions mandated by section 3.6 of the Plan. The amount currently allowable as deductions to the Plan is tied to the pension benefit levels of the Plan. 26 U.S.C. § 404(a)(1). It is not related to the financial circumstances of the individual Clubs. Thus, it is theoretically possible that some Clubs may be unable, because of their particular financial situation, to take full advantage of the amounts that are currently deductible.[7] They would nevertheless still be bound by the irrevocability provision of section 3.6 of the Plan.

Finally, section 3.6 of the Plan may plausibly raise an inference contrary to the one espoused by the Management

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[7] It is possible, for example, that a Club would show a net loss for the year, making the availability of the current deduction for contributions to the Plan meaningless in any practical sense.

parties. The fact that contributions are irrevocable supports reading the "allowable as deductions" language literally because the irrevocability provision indicates an apprehension on the part of the Players that the Clubs, finding themselves unable to take their deductions currently, would attempt to take back the portion that had to be carried over to subsequent years. Indeed, if the "allowable as deductions" language were read to mean allowable as current deductions, the need for an irrevocability provision would have been far less urgent. The Clubs would contribute only what was currently allowable as a deduction and would therefore have no basis for requesting a refund.

In short, even when the Agreement is read in *pari materia* with the Plan, there is no inherent inconsistency in giving the "allowable as deductions" language its plain meaning.

The Court is also unpersuaded by the argument that the Player-Trustees should be held to the position that they took in the Board's application for an IRS letter ruling. A letter to the IRS From co-counsel to the Board, dated July 27, 1984 states: "Since the Plan's inception in 1959, all contributions to the Plan have been deductible to the contributing employers in the year in which such contribution were made . . . and the parties reasonably anticipated that contributions to the Plan during the life of the new CBA would likewise be deductible." In a supplementary submission to the IRS in November, 1985, co-counsel to the Board stated: "The parties anticipated that all contributions made to the Plan during the term of the 1982 Agreement would be currently deductible, as had been the case with all contributions since the Plan's inception in 1959." Letter from Retirement Board Co-Counsel to Rowland Cross, IRS at 4 (November 8, 1985).

Because of the Court's ruling that the "allowable as deductions" language is unambiguous, the statements prof-

fered by the Management parties are inadmissible under the parol evidence rule. Even if the Court were to consider the statements, however, they would not necessarily support the Management parties' position. The fact that the parties to the Agreement "anticipated" that contributions to the Plan would be currently deductible does not mean that they intended to condition the obligation of the Clubs to contribute on current deductibility or that they intended to ascribe a meaning to the "allowable as deductions" language other than its plain meaning.

Because this Court finds no ambiguity in the disputed provision of the contract, this case poses a question of law properly resolved on a motion for summary judgment. The Court finds that all $12,500,000 of the annual contribution amounts were "due" within the meaning of the Agreement on or before the end of each of the five Plan Years covered by the Agreement. By the Court's calculations, the Clubs have completely discharged their obligations for the Plan Years ending on March 31, 1983 and March 31, 1984.[8] For the Plan Year ending March 31, 1985, the Clubs have discharged their principal obligation but, because $5,977,013.37 of the $12,500,000 due on or before March 31, 1985 was paid on April 1, 1985, the Clubs owe interest for late payment at the annual rate of 6 percent for the one-day delinquency. The Clubs have paid no part of the $12,500,000 due on March 31, 1986. Therefore they owe $12,500,000 in principal plus interest on the amount running from April 1, 1986. The Clubs have paid only $7,151,839.63 of the $12,500,000 amount due on March 31, 1987. Therefore, they owe $5,348,160.37 principal plus 6 percent annual interest running from April 1, 1987. In

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[8] Although the Clubs paid only $7,436,700 of their $12,500,000 obligation on March 31, 1984, they subsequently paid another $5,227,013.37 on October 10, 1984, representing the amount by which the March 31, 1984 payment fell short of $12,500,000 plus interest for late payment at the annual rate of 6 percent.

short, the Clubs owe a total of $17,848,160.37 in principal; interest for one day on the $5,977,013.37 portion of principal paid on April 1, 1985; interest on $12,500,000 running from April 1, 1986; and interest on $5,348,160.37 running from April, 1987.

A separate Order will be entered granting the Player-Trustees' motion for partial summary judgment in the foregoing amounts. The motion for partial summary judgment also seeks attorneys' fees. Because this aspect of the motion has not been thoroughly briefed, the Court will reserve ruling on it until the amount of and the legal basis for an award of attorneys' fees is brought to the Court's attention.

Motion to Dismiss Management-Trustees Declaratory Judgment Action

For obvious reasons, the action for a declaratory judgment by the Management-Trustees in Civil No. HM-87-509 is not moot. Accordingly, it will be dismissed.

Cross-Motion for Summary Judgment on Breach of Trust Claims

The only unresolved matter in these consolidated cases is the counterclaims for breach of trust asserted by the Player-Trustees in Civil No. HM-87-509. The Court will deny the Management-Trustees' cross-motion for summary judgment on these counterclaims with leave to renew the motion once discovery has been completed. The Court will issue a separate Scheduling Order to govern the future course of this litigation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWILL, ET AL.
V.
EDWARD R. GARVEY, ET AL.

CIVIL NO. HM-87-509

THOMAS J. CONDON, ET AL.
V.
NATIONAL FOOTBALL LEAGUE, ET AL.

CIVIL NO. HM-87-698

ORDER

In accordance with the accompanying Memorandum of this date, and as more fully explained therein, it is this 22nd day of July, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the plaintiffs' ("Player-Trustees") motion for partial summary judgment on Count One of their complaint in Civil No. HM-87-698 be, and the same hereby is, *Granted*, except as it requests an award of attorneys' fees;

(2) that the amount of the judgment granted is as follows:

(a) $17,848,160.37 in unpaid contributions;

(b) interest at the annual rate of 6 percent for one day on the amount of $5,997,013.37;

(c) interest at the annual rate of 6 percent on $12,500,000 running from April 1, 1986 to the

date of payment of the principal obligation; and

(d) interest at the annual rate of 6 percent on $5,348,160.37 running from April 1, 1987 to the date of payment of the principal obligation;

(3) that the action for a declaratory judgment by the plaintiffs ("Management-Trustees") in Civil No. HM-87-509 be, and the same hereby is, *Dismissed* as moot;

(4) that the cross-motion for summary judgment by the Management-Trustees on the breach of trust claims asserted by the Player-Trustees by way of counterclaim in Civil No. HM87-509 be, and the same hereby is, *Denied* with leave to renew the motion once discovery has been completed; and

(5) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to the parties.

Herbert L. Murray
United States District Judge

APPENDIX C

U.S. District Court,
District of Maryland

William V. Bidwill, et al.

v.

National Football League, et al.

Civil Nos. HM-87-509 and HM-87-698

MURRAY, District Judge.

The Court having considered the motion of Plaintiffs in C.A. No. HM-87-698 ("the Player-Trustees") to alter or amend this Court's order of July 22, 1988, granting the Player-Trustees' motion for partial summary judgment on their claim under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et. seq.*, it is this 31st day of August, 1988,

ORDERED:

(1) that the Player-Trustees' motion to alter or amend the Court's order of July 22, 1988, is GRANTED in its entirety; and

(2) that, amending Paragraph (2) of the Court's previous order and correcting an omission, judgment is awarded to the Bert Bell Player Retirement Plan and against Defendants in C.A. No. HM-87-698 in the following amount, as required by 29 U.S.C. §1132(g)(2):

(a) $17,848,160.37 in unpaid contributions;

(b) interest at the annual rate of 6 percent for one day on the amount of $5,997,013.37;

(c) interest at the annual rate of 6 percent on $12,500,000 running from April 1, 1986 to the date of payment of the principal obligation, and

(d) interest at the annual rate of 6 percent on $5,348,160.37 running from April 1, 1987 to the date of payment of the principal obligation;

(e) an additional amount equal to the total accumulated interest awarded; and

(f) reasonable attorney's fees and costs incurred by the Player-Trustees for their efforts on behalf of the Plan, in an amount to be determined by the Court, following a submission by the Player-Trustees within thirty (30) days of the issuance of this Order.

(3) that Paragraphs (1), (3), and (4) of this Court's July 22, 1988 Order are unchanged and shall continue in full force and effect.

(4) that the Clerk of Court shall mail a copy of this Order to the parties.

Herbert L. Murray
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWELL, et. al

v.

EDWARD R. GARVEY, et. al

CIVIL ACTION NO.: HM-87-509

MAGISTRATE'S REPORT AND RECOMMENDATION

On December 11, 1982, the National Football League [NFL] Players Association [Players], and the NFL Management Council [Managers], entered into a five-year Collective Bargaining Agreement [Agreement].[1] The Agreement included provisions for continuing the NFL players' pension and benefit trust, i.e., the Bert Bell NFL Player Retirement Plan [Plan]. A Retirement Board was also created to administer the Plan through seven trustees—the Commissioner of the NFL as a non-voting trustee, plus six appointed and voting trustees: the Manager-Trustees (Bidwill, Lynn, and Kensil) and the Player-Trustees (Garvey, Condon, and Jiggetts).[2]

In 1984, the Trustees to the plan disagreed as to the operation of a clause in the Agreement regarding deductibility of contributions to the Plan. The clause obligates

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[1] The procedural history of this case is set forth in full in the Court's Memorandum and Order dated July 22, 1988. (Paper No. 32 at 1-7).

[2] The Manager-Trustees are also Club owners or officers: William V. Bidwell is the owner of the St. Louis/Phoenix Football Cardinals; James Kensil is the President of the New York Jets; and Michael Lynn is the executive Vice-President of the Minnesota Vikings. The Player-Trustees are Edward R. Garvey, Tom Condon, and Dan Jiggets.

the Clubs to contribute $12,500,000 to the Plan for each Plan Year "provided that such contributions are allowable as deductions under the applicable provisions of the Internal Revenue Code." (Paper No. 32 at 9, Court's Memorandum and Order dated July 22, 1988) (citing Agreement, Article XXXIV). The dispute developed when the Managers informed the Trustees that the full amount of contributions would not be paid because the deductibility provision limited the amount payable to the amount deductible in that year.

The Player-Trustees objected and at a Retirement Board meeting in April, 1984, they proposed that the Board adopt a number of Resolutions: "(1) that the Board demand immediate payment, with interest, of the $5,063,3000 which had been withheld from the March, 1984 payment; (2) that the Board authorize legal action to recover the unpaid sums; (3) that Plan benefits be increased to assure current deductibility of contributions; and (4) that a ruling on the deductibility of the contributions be sought from the IRS." (Paper No. 32 at 4, Court's Memorandum and Order dated July 22, 1988). The Manager-Trustees abstained from voting on the first two resolutions, voted "no" on the third, and agreed to the fourth. (*Id.*). Thus, only the fourth Resolution passed.

On March 5, 1987, prior to the IRS's ruling on the deductibility issue, the Manager-Trustees brought a declaratory judgment action in this Court against the Player-Trustees as to the amount of contributions due under the Plan. (Paper No. 1). The Player-Trustees answered and counterclaimed that the Manager Trustees had breached their fiduciary duties as trustees. (Paper No. 4 at 6-9). On July 22, 1988, this Court issued a Memorandum and Order, granting summary judgment to the Player-Trustees as to the declaratory judgment action. (Paper No. 32 and 33). The Court denied both parties' motions for summary judgment as to the claims for breach of fiduciary duty, pending completion of discovery.

Currently before the Court are cross-motions for summary judgment filed by counter-claim plaintiffs, the Player-Trustees, and by counter-claim defendants, the Manager-Trustees. (Papers No. 72 and 71, filed February 15, 1989). The Player-Trustees filed their opposition to the Manager-Trustees' motion on March 1, 1989 (Paper No. 74), and a Reply to the Manager-Trustees' opposition, on March 27, 1989. (Paper No. 77). The Manager-Trustees filed their opposition and reply on March 13, 1989. (Paper No. 75). No hearing is deemed necessary. Local Rule 105.6.

I. STANDARD FOR SUMMARY JUDGMENT.

Pending before the Court are motions for summary judgment. The criteria set out in Fed. R. Civ. P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact. The Supreme Court has stated that "this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (emphasis by court). The Court noted that a material fact is one that "might affect the outcome of the suit under the governing law." and that a genuine dispute exists, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

II. COUNTERCLAIMS: BREACH OF FIDUCIARY DUTIES.

The Court set forth the Player-Trustees' breach of trust claims in its January 25, 1989, Memorandum and Order:

> The remaining, unresolved claims require a determination as to whether the Management Parties violated their fiduciary duties to act solely and exclusively in the interests of the Plan beneficiaries

> when, as owners or executives of NFL Clubs which stood to benefit from non-payment of pension contributions, they (1) refused to vote on resolutions to demand payment from the Clubs and to institute suit against the Clubs (Counterclaim, Count I); and (2) voted against a resolution to increase benefits to Plan beneficiaries and thereby eliminate any overfunding of the Plan, the sole asserted justification for the Clubs' delinquency (counterclaim, Count II).

(Paper No. 69 at 2). The factual background of this case is set forth in greater detail in the Court's prior Memoranda and Orders, therefore only those matters relevant to resolution of the pending motions for summary judgment are discussed here.

A. STANDARD OF CARE FOR FIDUCIARIES.

The Player-Trustees' claims are premised on allegations that the Manager-Trustees breached their fiduciary duties owed as trustees of the Plan. Therefore, the first issue involves the nature of the fiduciary duties owed by the trustees.

A fiduciary or trustee is required to act in the best interests of the plan beneficiaries, and the Fourth Circuit affirmed this duty in *Mt. Sinai Hospital of Baltimore v. National Benefit Fund*, by citing the Supreme Court's opinion in *NLRB v. Amax Coal Co.*. 453 U.S. 322 (1981), and stating: "The [Supreme] Court held that such a [employer-appointed] trustee was not a management representative but owed his complete fiduciary loyalty to the trust and its beneficiaries." *Mt. Sinai Hospital of Baltimore v. National Benefit Fund.* 697 F.2d 562, 566 (4th Cir. 1982) (citing *NLRB v. Amax Coal Co.* 453 U.S. at 328. *See also* Employment Retirement Income Security Act [ERISA], codified at 29 U.S.C. § 1001, 1104(a)(1)(A). In this case, the Manager-Trustees as fiduciaries clearly have a duty of loyalty to Plan beneficiaries.

The next issue concerns what standard is used to determine whether the trustees in this case acted according to their fiduciary duties and in the best interests of the Plan. The Court has previously determined that the Plan is a qualified pension trust under ERISA, 29 U.S.C. § 100 *et seq.* (Paper No. 51, 3-4, n. 2 & 3). Therefore, the fiduciary duty owed by the trustees to the Plan is to be evaluated under the standards set forth in ERISA, as interpreted by the courts. As to this duty of care, the statute provides in part that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

29 U.S.C. § 1104(a)(1)(A), (B). This is the "prudent person" standard.

The Manager-Trustees assert that the prudent person standard should not be used to evaluate their actions. Instead, they contend that a broader and more discretionary, "arbitrary and capricious" standard is appropriate—a standard derived from the Labor Management Relations Act [LMRA], 29 U.S.C. § 186(c). They also allege that a good faith defense is available under such a standard. *See Chicago District Council of Carpenters Pension Fund v. Exhibition Contractors Co.*, 618 F.Supp 234, 235 (N.D.Ill.

1985); *but see Donovan v. Daugherty*, 550 F. Supp. 390, 403 (S.D.Ala.1982). In the instant case the arbitrary and capricious standard is inappropriate. Courts have applied this standard when trustee decisions regarding an individual's claims to benefits are at issue. *See Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1148 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) (citing *Berry v. Ciba-Geigy Corporation*, 761 F.2d 1003 (4th Cir. 1985)); *LeFebre v. Westinghouse Electric Corp*, 747 F.2d 197 (4th Cir. 1984)). *See also Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 57 (3rd Cir. 1985), *cert. denied*, 474 U.S. 843; *Chicago District Council of Carpenters Pension Fund v. Exhibition Contractors Co.*, 618 F.Supp. at 235.

However, the Supreme Court recently examined the use of LMRA's arbitrary and capricious standard in cases involving ERISA and determined: "[a] comparison of the LMRA and ERISA, however, shows that the *wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." *Firestone Tire and Rubber Co. v. Richard Bruch*, 57 U.S.L.W. 4194, 4196 (U.S. Feb. 21, 1989). The Court stated:

> Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans. (citations omitted). Thus, the *raison d'etre* for the LMRA arbitrary and capricious standard—the need for a jurisdictional basis in suits against trustees—is not present in ERISA. (citations omitted). Without this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard insofar as § 1132(a)(1)(B) of [ERISA] is concerned.

Id. The Court then concluded that a denial of benefits was to be reviewed under a *de novo* standard unless the fi-

duciary had discretionary authority under the benefit plan, to construe the terms of the plan or eligibility for benefits. *Id.* at 4198.

The dispute in the instant case, however, lies not with the Manager-Trustees' decisions on individual claims, but on the administration of the trust. Courts have consistently applied the prudent person standard to such disputes. *See Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333-34, *disapproved on other grounds, Firestone Tire and Rubber Co. v. Richard Bruch*, 57 U.S.L.W. at 4196; *Wright v. Nimmons*. 641 F. Supp 1391, 1403 (S.D.Tex. 1986); *Katsaros v. Cody*, 744 F.2d 270, 279 (2nd. Cir. 1984), *cert. denied*, 469 U.S. 1072. Consequently, the prudent person is the appropriate standard in this case.

B. ALLEGED VIOLATIONS OF STANDARD OF CARE.

Relative to this prudent person standard, the counterplaintiffs assert two claims of fiduciary breach by the Manager-Trustees: 1) the trustees breached their fiduciary duties when they failed to demand payment from the Clubs or institute suit against the Clubs; and 2) a breach of duty occurred when the Manager-Trustees voted against a resolution to increase benefits to Plan beneficiaries.

1. FAILURE TO PURSUE PAYMENT—COUNTERCLAIM.

The Player-Trustees contend that there are two reasons why the Manager-Trustees' failure to pursue payment constituted a breach of fiduciary duties. First, they assert that, as Club owners, the Manager-Trustees acted in their own interests by attempting to reduce their obligations under the Plan. Second, the Player-Trustees allege that the Manager-Trustees acted in a "conspiracy" with other club owners in an attempt to reduce their obligations under the Plan. (Paper No. 72 at 32-33). These allegations of fiduciary breach are premised on claims that the Manager-

Trustees' failure to pursue payment arose out of improper motives.

The Manager-Trustees defend their actions by asserting that they fulfilled their duties as trustees by requesting a private letter ruling from the IRS as to the deductibility of the contributions. (Paper No. 71 at 6-7). They also contend that they acted properly as fiduciaries by refraining from actions which could have harmed the Plan. Counter-defendants state that they believed the full contributions were not due under the Plan and pursuing the payments would have threatened the Plan's tax qualified status. The Manager-Trustees also deny that they were motivated by self-interests or conspiratorial motives. (Paper No. 75 at 48). Without ruling on the validity of the Manager-Trustees' claims, the Court notes that the Plan's status under the IRC may be an appropriate consideration for the trustees' administrative decisions. *See Wright v. Nimmons.* 641 F.Supp. at 1403. Thus, the Player-Trustees' allegations focus on the intentions of the Manager-Trustees in refusing to adopt measures to pursue payments.

It is clear that summary judgment may be inappropriate where the issue before the court involves the intentions of the parties. As one court noted:

> Claims . . . which are premised on alleged violations of civil rights, or on labor disputes, typically turn on issues of fact concerning good faith or intent. They are therefore usually unsuited for summary judgment. [citation omitted]. Notwithstanding this premise, if the question of good faith or intent is not a genuine issue, but rather constitutes mere surmise, summary judgment is appropriate.

Rockland County Sheriff's Deputies v. Grant, 670 F. Supp. 566, 568 (S.D.N.Y. 1987). Courts have ruled that allegations of conspiracy or of self-interests are not proper cases for summary judgment where intent is at issue. The Third Circuit set forth factors that were considered by the court

in evaluating a claim for breach of fiduciary duty in a case involving a trust fund:

> We must consider, for example, whether the Employer Trustees voted as they did on the instructions of the Employers; whether they took time to investigate the merits of alternative courses of conduct; and whether they consulted with others, for example their attorneys. [citations omitted] We do not intend this list of considerations to be exhaustive.

Struble v. New Jersey Brewery Emp. Welfare Trust Fund, 732 F.2d at 335. The court then denied summary judgment, stating that the record contained "almost no evidence revealing what factors the Employer Trustees considered in deciding to vote [contrary to the plaintiffs' wishes] . . . ." *Id.*

In *Wagner v. Owens-Illinois. Inc.*, 622 F. Supp. 29 (N.D. Ill. 1985), the court denied summary judgment where a factual issue existed as to the defendant's intent when the plaintiffs' grievances were mishandled. *Id.* at 32. Also, in *Dooley v. American Airlines. Inc.*, 797 F.2d 1447 (7th Cir. 1986), *cert. denied* 479 U.S. 1032, 479 U.S. 1087 (1987), the court denied summary judgment where the defendant-trustees had raised a material issue of fact as to whether their vote with respect to a trust was intended to benefit the trust or other parties. *Id.* at 1453-54.

In the case at bar, the Manager-Trustees allege that in voting not to pursue payment, they intended to benefit the plan and its beneficiaries. Therefore, a genuine dispute remains regarding the actual reasons for the Manager-Trustee' abstention on the Resolutions to pursue payment. Although the parties maintain that there are no disputes as to the facts, (*see* Papers No. 75 at 2 and 77 at 1-2), summary judgment is inappropriate where, as here, a genuine dispute exists as to the meaning ascribed to those facts. Courts have been clear on this rule: "Even if the

basic facts are not disputed, summary judgment may be inappropriate when contradictory inferences may be drawn from them." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *EEOC v. United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry, Local 189*, 427 F.2d 1091, 1093 (6th Cir. 1970), *cert. denied*, 404 U.S. 832 (1971). Varied inferences may be drawn from the Manager-Trustees' actions. Consequently, both parties' motion for summary judgment should be denied as to Count I of the Player-Trustees' counterclaims.

2. FAILURE TO RAISE BENEFITS— COUNTERCLAIM II.

The parties also request summary judgment as to counter-plaintiffs' second claim, that the Manager-Trustees failed in their fiduciary duties when they voted against the Resolution to raise benefits. The Manager-Trustees assert two defenses to this claim. First, that they have no authority under the Agreement to raise benefits, thus their failure to do such was proper.[3] Second, that they have substantial and valid reasons for refusing to raise benefits, reasons premised on their concern for the continued financial security of the Plan.

a. Authority to Raise Benefits.

The Manager-Trustees assert that the Agreement does not give them the authority to raise benefits. This assertion is without merit. Although the Agreement specifies amounts of benefits, (Paper No. 71 at 5, Exhibit B, *citing* the Agreement, Article XXXIV, § 8), it also gives the trustees the authority to amend the Agreement. *Id.*, Agreement, Article XXXIV, §§ 8, 9. This power to amend has certain limitations that are expressly stated in the

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[3] The Manager-Trustees continue to contest any action by the Board to raise benefits. At the December 8, 1988, meeting of the Retirement Board, they again voted against increasing benefits. (Paper No. 72 at 19-21).

Agreement. *Id.* None of these exceptions, however, refer to the trustees' ability to raise benefits.

The provisions of the Agreement must be read in conjunction with *Mt. Sinai Hospital of Baltimore v. National Benefit Fund,* 697 F.2d 562 (4th Cir. 1982), in which the Court asserted: "[t]he obligations of the trustees to the beneficiaries of the trust are to be interpreted in accordance with the terms of the trust . . . ." *Id.* at 569. Therefore, in the case at bar, the trustees have the authority to raise benefits because the Agreement implies such authority in its grant of amendment powers and its failure to expressly deny the Board the authority to raise benefits.

Even more instructive is the fact that the trustees have already raised benefits, and have done so while the Agreement provisions and exceptions were in place with respect to such powers. (Paper No. 75 at 24-25). Therefore, the Manager-Trustees' claim that they have no power to alter benefits should be rejected.

b. Substantive rationale for refusing to raise benefits.

A substantive rationale offered by the Manager-Trustees for their vote against increased benefits is that they fear doing so will financially jeopardize the plan. (Paper No. 75 at 28). They allege in particular: "As the Player Trustees have themselves observed, a financial setback like the one which occurred in October of 1987 (when the New York Stock Exchange dropped several hundred points) could easily cause much of the Plan's 'paper' wealth to evaporate." (Paper No. 75 at 28).

A fiduciary has a duty to act in accordance with the best interests of the plan and a breach of such duty will result in liability. In this case, however, a material issue of fact remains as to why the Manager-Trustees voted against increased benefits. Thus, summary judgment is not proper and should be denied.

c. Conspiracy.

The Player-Trustees allege that one reason for the Manager-Trustees' votes against a benefits increase was that a conspiracy exists between the Manager-Trustees and other club owners to reduce the amount of contributions paid. As stated above, the Court has ruled that such an allegation, based on the intention of the parties, cannot be determined based on the record at bar. Thus, summary judgment should be ruled inappropriate.

d. Failure to Investigate.

The Player-Trustees' breach of trust claims are also premised on the allegation that the Manager-Trustees failed to investigate both the Resolution to raise benefits or any alternatives to such action. (Paper No. 72 at 36-37). It is established that such a failure may result in liability for breach of duty: "A review of a fiduciary's independent investigation is one of the well-established yardsticks against which courts have customarily tested fiduciary conduct for prudence." *Donovan v. Bierwirth*, 538 F. Supp. 463, 470 (1981) (citations omitted), *modified on other grounds*, 680 F.2d 263 (2nd Cir.). *cert. denied*, 459 U.S. 1069 (1982); *see also Schaefer v. Arkansas Medical Society*, 853 F.2d 1487, 1491 (8th Cir, 1988); *Donovan v. Mazzola*, 716 F.2d 1226, 1231-32 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), *rev'd on other grounds*, 761 F.2d 1411 (1985). In *Donovan v. Bierwirth*, the court continued:

> However, when a fiduciary has dual loyalties, his independent investigation into the basis for an investment decision which presents a potential conflict of interests must be both intensive and scrupulous and must be discharged with the greater degree of care that could be expected under all the circumstances by reasonable beneficiaries and participants of the plan.

(*Id.*).

A conflict of interest exists in the case at bar. The Manager-Trustees are Club owners as well as trustees. The owners refused to make the full $12.5 million contribution to the Plan because they asserted that the full amount was not deductible because the Plan was overfunded. An increase in benefits would have eliminated the excess funds which would have made the full $12.5 contribution due. If the Manager-Trustees had agreed to the increase, they would have become immediately liable, as club owners, for paying the full contribution. Thus, there is an inherent conflict of interest in the Manager-Trustees' positions as both trustees and club owners.

This inherent conflict, however, does not constitute a *per se* fiduciary breach. The ERISA provides in part:

> (c) **Fiduciary benefits and compensation not prohibited by section 1106**
>
> Nothing in section 1106 of this title [regarding prohibited transactions under ERISA] shall be construed to prohibit any fiduciary from—. . .
>
> (3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

29 U.S.C. § 1108(c)(2). It does, however, indicate that the duty owed by the Manager-Trustees to investigate is heightened, as indicated by the Court in *Donovan v. Bierwirth, supra.* The record before the Court contains allegations by the counter-plaintiffs that the Manager-Trustees failed to investigate either the Resolution to raise benefits or any alternatives to this recommendation. (Paper No. 72 at 4). These allegations are not mere speculation, as the Manager-Trustees contend. The Player-Trustees point out that immediately prior to the first vote on the Resolution to raise benefits, Jack Donlan, the Management Council's Executive Director, declared, "We don't need to caucus

on that one." (Paper No. 72 at 11, *citing* Paper No. 23; Exhibit D at 143).

There are a number of factual inferences which could be drawn from this statement. Donlan could have been asserting that the Manager-Trustees had fully discussed and investigated the proposal and had already rejected it as harmful to the Plan and beneficiaries. By contrast, he could have been indicating that the Manager-Trustees would not investigate or even consider such a proposal because it would be detrimental to their interests as club owners. Such conflicting factual inferences as to the Manager-Trustees' preclude summary judgment on this issue. *See supra.* Part II(B)(1).

Genuine disputes as to material issues of fact exist regarding the Player-Trustees' claim regarding the failure to increase benefits, including whether or not the Manager-Trustees had a substantive rationale for their vote, and whether they failed to consider the proposal or investigate other options. Although the court finds that the trustees have authority to raise benefits under the Plan, the Court makes no factual conclusions as to the two remaining contentions. Therefore, there is no basis for granting summary judgment on the Manager-Trustees' failure to vote in favor of an increase in benefits and summary judgment should be denied as to counterclaim II.

III. CONCLUSION

This case requires inquiry into factual disputes material to resolution of claims that the Manager-Trustees breached their fiduciary duties as trustees of the Bert Bell NFL Player Retirement Plan. Therefore, both parties motions for summary judgment as to these claims should be denied.

Respectfully Submitted

Daniel E. Klein
UNITED STATES MAGISTRATE

August 31, 1989

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OP MARYLAND

WILLIAM V. BIDWELL, et al.

v.

EDWARD R. GARVEY, et al.

CIVIL NO. JH-87-509

THOMAS J. CONDON, et al.

v.

NATIONAL FOOTBALL LEAGUE, et al.

CIVIL NO. JH-87-698

MEMORANDUM OPINION

Pending before the Court are cross-motions for summary judgment. (Paper Nos. 71 and 72). Oppositions, (Paper Nos. 74 and 75), and replies have been filed. (Paper Nos. 75 and 77). Judge Herbert F. Murray referred these motions to Magistrate Daniel E. Klein for a report and recommendation which was issued on August 31, 1989. (Paper No. 81). Subsequently the parties filed objections to the report and recommendation, (Paper Nos. 83, 84, 85, and 86), as well as replies. (Paper Nos. 88 and 89). The motions are now ripe for disposition, and this case has been transferred to the undersigned. No hearing is necessary to resolve the legal issues presented. Local Rule 105.6.

The Bert Bell NFL Player Retirement Plan ("Plan") is a pension and benefit trust for the members of the National Football League Players Association ("NFLPA") and their families.[1] The Plan is managed by a seven member Retirement Board. Three members of the Retirement Board are appointed by the NFLPA,[2] three members are appointed by the National Football League Management Council ("NFLMC"),[3] and the Commissioner of the NFL is the seventh and a nonvoting member of the Retirement Board.[4]

The player trustees' counterclaims center on the conduct of the management trustees at two meetings of the Retirement Board. Count one generally alleges that the management trustees breached their fiduciary duty to the Plan by refusing to pursue contributions which the player trustees believed to be due at the August, 1986 meeting. Count two, in substance, alleged that the management trustees breached their fiduciary duty by failing to amend the Plan in order to permit greater benefits to the beneficiaries at the April, 1984 meeting.

I. Players' Motion

The Court will first address the player trustees' motion for summary judgment. For the reasons which follow, the

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[1] Bert Bell was the first Commissioner of the National Football League ("NFL"). One of Bert Bell's many achievements includes initiating the idea of a pension plan for professional football players.

[2] The NFLPA appointees were: Edward Garvey, former Executive Director of the NFLPA; Danny Jiggetts, who played for the Chicago Bears; and Thomas Condon, who plays for the Kansas City Chiefs. The Court will refer to these three members of the Retirement Board collectively as the player trustees.

[3] The NFLMC appointees were: William Bidwell, owner of the St. Louis/Phoenix Football Cardinals; James Kensil, President of the New York Jets; and Michael Lynn, Executive Vice President of the Minnesota Vikings. The Court will refer to these three members of the Retirement Board collectively as the management trustees.

[4] The Commissioner of the NFL was Pete Rozelle.

Court holds that the management trustees breached their fiduciary duties to the Plan. In so doing the Court will analyze the issue somewhat differently than Magistrate Klein. However, the Court has conducted a *de novo* review and, but for page sixteen of the report and recommendation, the Court adopts Magistrate Klein's conclusions.

In 1982 the NFL Player's Association ("Player's Association") and the NFL Management Council ("Management Council")[5] negotiated a collective bargaining agreement which modified the prior 1977 agreement. The collective bargaining agreement required the various clubs represented by the Management Council to make an annual contribution of twelve and one-half million dollars. In addition, the contributions were conditioned on certain deductibility provisions of the Internal Revenue Code.

Early in 1984 the Management Council informed the Player's Association that the full contribution would not be made. According to the Management Council, the twelve and one-half million dollars were not currently deductible pursuant to the Internal Revenue Code, and therefore the full amount was not due. Three weeks later the Retirement Board convened and the player trustees objected to the partial contribution.

At this meeting, the player trustees proposed four resolutions in response to the partial contribution. First, they proposed that the Retirement Board demand immediate payment, with interest, of the amount which had been withheld. Second, the player trustees suggested that the Retirement Board authorize legal action to recover the unpaid sums. Third, a resolution was proposed that Plan benefits be increased to ensure the current deductibility of contributions. Finally, it was proposed that a ruling on

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[5] The NFL Management Council acts on behalf of the twenty-eight football clubs which belong to the National Football League of Professional Clubs.

the deductibility be sought from the Internal Revenue Service.

In response to these resolutions, the management trustees abstained from voting on the first two resolutions, and voted against the third. Aa a result, these three resolutions did not pass. The fourth resolution, to seek an Internal Revenue Service ruling, was adopted unanimously.

Again in 1985 and 1986, when the contributions were due to the Plan, the Management Council informed the Player's Association that only partial payments would be made. In August of 1986 the Retirement Board met again. Also, once again, the player trustees proposed identical resolutions to demand full payment and institute litigation to recover the sums due and owing. These resolutions did not pass because the management trustee declined to vote in order to confer with counsel.

Finally, in March of 1987 the management trustees commenced an action against the player trustees. The complaint sought a declaration whether the contributions were due to the plan under the collective bargaining agreement. The player trustees answered and also asserted the counterclaims which are at issue in the present motions. In addition, with the knowledge that the best defense is often a strong offense, the player trustees initiated a separate action against the Management Council, and others. The player trustees' complaint alleged that the failure to make full contributions was unlawful pursuant to statutory and common law causes of action.

Counterclaim plaintiffs, as the moving parties, bear the initial responsibility of informing the district court of the basis for their motion. The movants must specifically identify those portions of the record which they believe demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The player trustees' motion for summary judgment argues that

there is no dispute as to the facts which establish the management trustees' breach of trust to the Plan.

To meet the player trustees' properly supported motion for summary judgment, the management trustees must come forward with facts to present a sufficient disagreement to require submission to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). They cannot simply rest on their pleading, but must point to specific evidence giving rise to a triable issue. *Supermarkets General Corp. v. Pathmark Title Co.*, 686 F. Supp. 535, 537 (D. Md. 1987).

Of particular importance to this motion, denials in the form of legal conclusions, unsupported by documentation or specific facts, are insufficient to create issues of material fact that would preclude summary judgment. *Securities and Exchange Commission v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980). In addition, an affidavit containing only conclusions, void of any factual support will not create a jury question. *Barwick v. Celotex Corp.*, 736 F.2d 946, 959-960 (4th Cir. 1984). That is, the existence of a mere "scintilla of evidence" in the management trustees' favor will be insufficient to survive a motion for summary judgment. *Anderson*, 477 U.S. at 252.

Because the substantive law determines which facts are the material facts, *Anderson*, 477 U.S. at 248, the Court must initially resolve a question of law. The player trustees have alleged a breach of fiduciary duty, and the Court has previously ruled that the Plan is a qualified pension trust under ERISA. Also, there is no dispute that the management trustees were each Plan fiduciaries pursuant to 29 U.S.C. § 1102(a). Therefore, the Court must determine the exact nature of the duty the management trustees owed to the Plan pursuant to the provisions of ERISA.

The statute provided for the duty of care as follows;

> (1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

29 U.S.C. § 1104 (a)(1)(A) and (B). This is commonly called the prudent person standard.

The management trustees argue that an arbitrary and capricious standard should be applied to their actions. However, the Court adopts Magistrate Klein's report and recommendation, and holds that the arbitrary and capricious standard is inappropriate. In this case the player trustees have not asked the Court to review the management trustees' interpretation of the Plan's governing documents. Rather, what is at issue is the manner in which the management trustees chose to resolve the conflict at, and subsequent to, the Retirement Board meetings.

Stated another way, the player trustees have implicated the management trustees' fiduciary duty to safeguard the Plan. Thus, the prudent person standard applies to the management trustees' administration of the trust. That this is the proper standard was made clear in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333-334 (3d Cir. 1984), as well as the Magistrate's report and recommendation. *See also Payonk v. HMW Industries*. 883 F.2d 221, 225 (3rd Cir. 1989); *Rosen v. Hotel & Restaurant Employees' Bartenders Union*, 637 F.2d 592, 600 (3rd Cir. 1981); *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1409 (9th Cir. 1989), *cert.*

denied, 454 U.S. 898 (1981); *Schaefer v. Arkansas Medical Soc'y*, 853 F.2d 1487, 1491 (8th Cir. 1988); *Trapani v. Consolidated Edison Employees' Mutual Aid Soc'y*, 693 F. Supp. 1509, 1514-15 (S.D.N.Y. 1988).

Case law has given further substance to the standard of care provided in 29 U.S.C. § 1104. For example, when a fiduciary has dual loyalties, as the management trustees did in their capacities as Plan trustees and club officers or owners, "the prudent person standard requires that he make a careful and impartial investigation. . . . A review of a fiduciary's independent investigation is one of the well-established yardsticks against which courts have customarily tested fiduciary conduct for prudence." *Schaefer*, 853 F.2d at 1492.

Where it is possible to question fiduciaries' loyalty, they "are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries." *Leigh v. Engle*, 727 F.2d 113, 126-6 (7th Cir. 1984). Finally, the evaluation of fiduciary's conduct is an objective one, not a subjective inquiry into a particular fiduciary's state of mind. *Restatement (Second) of Trusts* § 174, comment a; G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 174, comment a; G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 541 at 157-58; *Katsaros v. Cody*, 744 F.2d 270, 279-80 (2d Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984).

The Court adopts Magistrate Klein's report and recommendation in connection with the finding that the management trustees were confronted with an inherent conflict of interest. If the management trustees had increased benefits or demanded payment, as club owners, they could have become immediately liable for the contribution. By choosing the option of delay and abstention, the management trustees were able to assure only partial payments.

If the management trustees had been successful, their strategy would have resulted in the St. Louis/Phoenix Football Cardinals benefiting by over $630,000, the New York Jets by over $693,000, and the Minnesota Vikings by over $614,000 as well as benefits to all of the other football clubs. Judge Murray's July 22, 1988 order, of course, changed that. The Court is not holding that the management trustees could not act under these circumstances, or even that they could not act as they did. Rather, the Court holds that in the face of this direct conflict, the management trustees were obliged to act more carefully.

A. Second Counterclaim

The second counterclaim alleges that by refusing to investigate the circumstances surrounding an increase in the benefits under the Plan, the management trustees failed to adequately discharge their duties to the Plan. This claim is directed at the April, 1984 Retirement Board meeting. The player trustees argue that no facts in the record show that the management trustees undertook an independent investigation of the proposal. As stated above, to survive this motion, the management trustees cannot simply rest on their pleading, but must raise specific facts which place the player trustees' contentions in dispute. *Anderson*, 477 U.S. 248-49. They have not done so.

At best, the management trustees argue that they did seek the advice of Mr. Karch at Baker & Hostetler before voting on the resolution. However, Mr. Karch also represented the Management Council and football clubs. This advice cannot be considered independent. *Katsaros v. Cody*, 568 F. Supp. 360, 367, 369 n. 12, *a'ffd*, *Katsaros*, 744 F.2d at 270. The undisputed evidence shows that the management trustees, when faced with a conflict of interest, did not fulfill their obligations as fiduciaries to the Plan and secure independent advice concerning their options.

B. First Counterclaim

The first counterclaim alleges that by refusing to independently investigate their vote for the resolutions involving immediate payment, the management trustees failed to adequately discharge their fiduciary duties to the Plan. This claim is directed at the August, 1986 Retirement Board meeting. Once again, the player trustees argue that no facts in the record show a dispute as to whether the management trustees undertook an independent investigation to consider options. Of particular importance is the fact that this was at least the second time the management trustees heard these resolutions.

At this meeting the management trustees abstained, and stated that the reason for their abstention was to confer with counsel. Although this was the proper decision of a prudent fiduciary, no such investigation was ever conducted. Subsequently, in March of 1987, without independent advice, the management trustees initiated this litigation. The legal advice from Baker & Hostetler, of course, cannot be considered independent. Accordingly, without evidence of an independent investigation, the management trustees do not survive the player trustees' motion for summary judgment. *Supermarkets General Corp.*, 686 F. Supp. at 537.

II. Management's Motion

The thrust of the management trustees' motion for summary judgment is threefold. First, it is based on the premise that the management trustees did not believe they had the authority to amend the Plan. Second, that theirs was a good faith dispute as to whether the full contribution was in fact due. Third, the management trustees had a good faith belief that the player trustees were impermissibly engaging in collective bargaining. Based on their good faith, the management trustees argue that their conduct was not a breach of fiduciary duty as a matter of law.

However, as discussed above, the management trustees did breach their fiduciary duties in failing to undertake an investigation. Thus, the issue presented is whether the management trustees' good faith in some way negates their obligation to make an independent investigation. The answer, of course, is that it does not.

At issue in this case is the management trustees' independent investigation, and as such, "[t]he fact that the trustee[s were] honest and well intentioned will not excuse [them] from the manifestation of the required amount of diligence and prudence." *Bogert*, § 543 at 217. Thus, although the Court adopted Magistrate Klein's conclusion that the trustees had the authority to amend the Plan, this point is reached only to deny the management trustees' motion for summary judgment.

What is important to note is that the management trustees are not being held liable for refusing to amend the Plan, for refusing to demand the full contribution, or refusing to engage in collective bargaining. They are liable for failing to make a scrupulous and independent investigation of their options in the face of an obvious conflict of interest.

III. Damages

Title Twenty-Nine of the United States Code section 1109 provides in pertinent part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

The player trustees request that the management trustees be held liable for the losses which resulted from their

breach of duty, in addition to removal of the management trustees involved in the present litigation.

With regard to monetary losses, the player trustees argue that if the management trustees had acted according to their duty, the Plan would have received full contribution. However, the player trustees have introduced no evidence showing a causal connection between the breach and the alleged losses. The player trustees cannot prevail on their motion for summary judgment by simply alleging causation.

Furthermore, the player trustees' motion does not point to an absence of disputed facts to support their claim for monetary damages. *Celotex*, 477 U.S. at 323. Without evidence of how a prudent trustee would have acted, or what a scrupulous and independent investigation would have disclosed, causation is not established and damages cannot be awarded. Accordingly, the issue of damages must be presented to a finder of fact.

In addition, the player trustees request that the management trustees be removed. However, the Court agrees with the management trustees that this exceptional form of relief is not appropriate based on the facts of this case. The cases in which this extraordinary remedy has been employed involve very egregious breaches, and often "repeated and substantial violations of [the trustees'] responsibilities." *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978).

IV. Conclusion

The Court holds that the management trustees did not discharge their duties to the Plan prudently because they failed to seek independent advice. Accordingly, the management trustees are liable for this breach pursuant to 29 U.S.C. § 1109. What remains to be determined are the damages to the Plan, if any, which were caused by the management trustees' breach of duty.

The Court will enter a separate order.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Judge

Date: May 7th,, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWELL, et al.

v.

EDWARD R. GARVEY, et al.

CIVIL NO. JH-87-509

THOMAS J. CONDON, et al.

v.

NATIONAL FOOTBALL LEAGUE, et al.

CIVIL NO. JH-87-698

ORDER

In accordance with the foregoing memorandum opinion of even date, it is this 7th day of May, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. that the counterclaim plaintiffs' motion for summary judgment as to the first counterclaim BE, and the same hereby IS, GRANTED as to liability;

2. that the counterclaim plaintiffs' motion for summary judgment as to the first counterclaim BE, and the same hereby IS, DENIED as to damages;

3. that the counterclaim plaintiffs' motion for summary judgment as to the second counterclaim BE, and the same hereby IS, GRANTED as to liability;

4. that the counterclaim plaintiffs' motion for summary judgment as to the second counterclaim BE, and the same hereby IS, DENIED as to damages;

5. that he counterclaim defendants' motion for summary judgment BE, and the same hereby IS, DENIED;

6. that the Clerk of Court mail copies of this order and the foregoing memorandum opinion to all counsel of record.

/s/ Joseph C. Howard
Joseph C. Howard
United States District Court Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWILL, et al.,
plaintiffs,

v.

EDWARD R. GARVEY, et al.,
defendants and counterclaim plaintiffs,

v.

WILLIAM V. BIDWILL, et al.,
counterclaim defendants.

CIVIL NO. JH-87-509

MEMORANDUM OPINION

Pending before the court is counterclaim plaintiffs' request for permanent injunctive relief. The counterclaim defendants have filed two separate oppositions addressing this issue, and two replies have also been filed. No hearing is necessary to resolve the legal questions presented. Local Rule 105.6 (D. Md. 1989).

By way of this motion, the counterclaim plaintiffs primarily seek to provide the beneficiaries of the Bert Bell NFL Retirement Plan ("Plan") with the benefits they have been entitled to since 1984. These benefits have been delayed all of these years due to the fiduciary breaches of the counterclaim defendants. The factual and legal background underlying the fiduciary breaches is explained in the court's opinion dated October 29, 1990 (paper no. 151).

Specifically, the counterclaim defendants request a permanent injunction which:

i) orders the Plan, its trustees, and its administrator immediately to increase benefit levels to Plan participants and beneficiaries as proposed by the counterclaim plaintiffs in resolutions made in 1988 and 1990;

ii) enjoins the counterclaim defendants from any future breaches of fiduciary duty in violation of ERISA, on penalty of contempt of court and removal from their positions as trustees of the Plan;

iii) orders the removal of Baker & Hostetler as co-counsel to the Plan and requires the counterclaim defendants to designate new counsel, subject to the court's approval;

iv) enjoins the counterclaim defendants from seeking or receiving indemnification from the NFL clubs or any other party in interest with the Plan for any future violations of ERISA's fiduciary provisions; and

v) orders the Plan and its administrator to distribute copies of the court's opinion, as well as its judgment and order to all Plan participants and parties in interest.

The motion also requests such additional relief as the court deems appropriate and continues jurisdiction over this matter.

Initially, the court notes that the power to order this relief stems from ERISA. The relevant statute provides that the district court may enjoin any act or practice which violates any provision of this subchapter, and may obtain other appropriate equitable relief to redress violations or

enforce provisions of ERISA. 29 U.S.C. § 1132(a)(5).[1] The court will address each of the counterclaim plaintiffs' requests in turn.

The court holds that an order requiring the trustees of the plan to amend benefits is appropriate. This order is consistent with the court's previous determination that a prudent trustee would amend Plan benefits, and that the failure to amend is a breach of fiduciary duty. The counterclaim defendants oppose this relief primarily based on the argument that the anti-injunction provision contained in the Norris-LaGuardia Act prevents the court from entering this relief. The court does not agree.

In this case the employer-employee relationship is not the matrix of the controversy. *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 712-13 (1982). Here, the controversy centers on the fiduciary duties of trustees who serve on the Retirement Board of the Plan. The court is not ordering the employers to do anything, but rather requiring that the counterclaim defendants in this action fulfill their fiduciary obligations.

Also, the counterclaim defendants' argument is premised on many flawed assumptions; that specific benefit levels were established in the collective bargaining agreement, that amendment is not permitted by the Plan documents, and that the full contributions are not due. All of these assumptions have been rejected by the court. Further, as a matter of equity, the court must be able to order this

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[1] Even if the traditional preliminary injunction test is applied, the request for relief should be granted. First, the counterclaim plaintiffs have prevailed on the merits. Second, because the money at issue has already been paid to the court, the balance of hardship favors the beneficiaries of the Plan (and the counterclaim plaintiffs' position) over the counterclaim defendants. However, even if hardship lies with anyone other than the Plan's beneficiaries, it is the twenty-eight National Football League clubs, not the counterclaim defendants. Third, public policy favors the court entering an order to prevent a continued breach of fiduciary duty.

relief in order to afford a complete remedy to the counterclaim plaintiffs and completely resolve this dispute. Counterclaim defendants' remaining objections are unpersuasive.

Accordingly, the court will order that the Plan trustees amend benefits in an actuarially sound manner consistent with the court's conclusions contained in the October 29, 1990 opinion retroactive to March 31, 1987. This relief is necessary because the record in this case establishes that the counterclaim defendants will oppose such a benefit increase and thereby continue to deadlock the Plan. In order to ensure compliance with ERISA and the Plan documents, as well as prevent further fiduciary breaches, this relief must be granted. The precise nature of the harm to the Plan's beneficiaries is described in the October 29, 1990 opinion.

Although the court will order that the trustees amend the Plan, the counterclaim defendants question the actuarial soundness of any particular benefit increase. Therefore, in order to resolve this motion, the court will require an actuarial assessment of the 1988 and 1990 resolutions. For this purpose, a special master will be appointed pursuant to Fed. R. Civ. P. 53. The fee of the special master will be paid for by the Bert Bell Plan. When the special master determines actuarially sound benefit levels, the court will order that the plan be amended consistent with the special master's determination. Any objections to this procedure should be made no later than November 5, 1990 at 12:00 p.m.

The court finds that the second, third and fourth requests are unnecessary in this case. Once the unpaid contributions have been paid to the Plan, plus interest, and the benefit levels adjusted accordingly, this dispute will be at an end. Of course, if the counterclaim defendants persist in similar fiduciary breaches in the future, they will be held accountable and the history of this dispute will be

relevant when fashioning appropriate relief. As the counterclaim defendants do not oppose the fifth item of relief, it shall be granted.

The court will enter a separate order.

/s/Joseph C. Howard
United States District Judge
Joseph C. Howard

Dated: October 29, 1990

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWILL, et al.,
plaintiffs,

v.

EDWARD R. GARVEY, et al.,
defendants and counterclaim plaintiffs,

v.

WILLIAM V. BIDWILL, et al.,
counterclaim defendants.

CIVIL NO. JH-87-509

OPINION

I. Procedural Background

On March 5, 1987 plaintiffs William Bidwill, James Kensil and Michael Lynn brought this action pursuant to 28 U.S.C. section 2201 alleging that certain employer contributions were not owed to the Bert Bell NFL Retirement Plan ("Plan") (paper no. 1). The defendants Edward Garvey, Tom Condon and Dan Jiggets answered and filed a counterclaim on March 27, 1987 (paper no. 4)[1]

[1] The counterclaim defendants objected at trial that the counterclaims are somehow limited only to the votes taken at the 1984 and 1986 Retirement Board meetings (transcript at 104; paper no. 142 at 48). However, the 1988 and 1990 meetings were included in the pretrial order (paper no. 129 at 10-12), and counterclaim defendants did not object before the trial nor suggest any sort of prejudice at trial. Simply because an event occurred after the filing of the counterclaim is not,

The original declaratory judgment was resolved against the plaintiffs by Judge Herbert F. Murray on July 22, 1988 by way of summary judgment in a related case brought by the three defendants against the National Football League ("NFL"), the National Football League Management Council ("NFLMC") and the twenty-eight member clubs of the NFL (paper nos. 32, 33 and 38). Judge Murray held that the withheld contributions of $17,848,160.37 were due and owing to the Plan (paper no. 32 at 15-16; 33 at 1). Judge Murray also found that the allowable as deductions language in the collective bargaining agreement did not mean currently deductible, as the NFL club owners and counterclaim defendants had argued (*id.*). Therefore, the only remaining issues for trial were framed in the two count counterclaim brought by defendants against plaintiffs (paper no. 4).

Count one of the counterclaim alleges a breach of fiduciary duty by three trustees of the Plan. Specifically, "[b]y failing to demand payment and refusing to institute suit to compel payment of Employer contributions, Counterclaim-Defendants Bidwill, Kensil and Lynn have placed their own interests and the interests of the Employers above the interest of the participants and beneficiaries of the Plan." (paper no. 4 at 7). Count two of the counterclaim also alleges a breach of fiduciary duty, and specifically refers to a breach "[b]y refusing to amend the Plan so as to ensure the complete deductibility of scheduled Employer contributions, Counterclaim-Defendants Bidwill, Kensil and Lynn have placed their own personal interests

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in itself, a ground to exclude evidence. F.R.E. 402. This conclusion is consistent with Fed. R. Civ. P. 13(a) and (e). Furthermore, the counterclaims involved in this case do not contain any sort of limitation to a particular Retirement Board meeting, rather, these claims simply allege impropriety by voting in a particular way in response to various resolutions (paper no. 4 at paragraphs 23-26 and 35-37). As these same votes were taken at the 1988 and 1990 meetings, these events are included in the counterclaim just as any other continuing course of action is encompassed in a claim. Fed. R. Civ. P. 8(f).

and the interests of the Employer above the interests of the participants and beneficiaries of the Plan" (*Id.* at 10).

In February of 1989 the parties filed cross motions for summary judgment on the breach of fiduciary duty counterclaims (paper nos. 71 and 72). The motions were fully briefed (paper nos. 74, 75 and 77), at which time Judge Murray referred them to Magistrate Daniel E. Klein for his report and recommendation pursuant to Fed. R. Civ. P. 72(b) (paper no. 79). After Magistrate Klein issued his report and recommendation on August 31, 1989 (paper no. 81), the parties filed timely objections pursuant to Fed. R. Civ. P. 72(b) (paper nos. 83, 84, 85 and 86), as well as replies (paper nos. 8 and 89). In April of 1990 this case was transferred from Judge Murray to the undersigned.

On May 7, 1990 the court ruled on the cross motions for summary judgment (paper nos. 97, 98 and 99). With regard to the counterclaim plaintiffs' motion, the court held that the counterclaim defendants breached their fiduciary duty by failing to conduct an independent investigation of options (*cf.* paper nos. 98 at 10 and 99 with paper nos. 81 at 14-16 and 72 at 36-37), and ruled that damages must be resolved by way of trial (paper no. 98 at 13). Other than this issue, the court did not dispose of any other breach of fiduciary duty claims contained in the two count counterclaim. Instead, the court expressly left these other issues open for trial (*id.* at 9, 11-12 and 13). The parties were informed of the upcoming trial date on the day of these rulings (paper no. 97). In addition, the court denied the counterclaim defendants' motion for summary judgment in its entirety (paper nos. 98 at 11-12 and 99).

Thus, at the trial, plaintiffs were presenting evidence of damages based on the failure to conduct an independent investigation, as well as any other claims framed in the two count counterclaim. Inexplicably, throughout the trial the counterclaim defendants made much of the court's May 7, 1990 memorandum opinion, arguing that the opinion

somehow limited the Issues for trial (*see e.g.* transcript of proceedings for July 9-12, 1990 at 97 ("transcript"); transcript at 185-188 and 267-272). Counterclaim defendants also attempted to make this argument by way of motions *in limine* and other memoranda (paper nos. 105 at 2-3; 107 at 1-2; 114 at 2-3; 136 at 33). In each case the agrument was rejected by the court (transcript at 98, 188 and 277; paper nos. 119 at 3 and 151 at 4).

The court was not persuaded by this argument for two related reasons. First, the counterclaim defendants were attempting to rely on the court's rulings on a motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure specifically provides that if a case is not fully adjudicated by the motion, the court will direct such further proceedings in the action as are just. Fed. R. Civ. P. 56(d). As mentioned above, the case was not fully adjudicated and the court determined that further proceedings were indeed required, and to that end selected a trial date (paper no. 97; *see also* paper no. 119). Due to the complex nature of the litigation the court determined that it was not practicable to make an order specifying the facts that appear without substantial controversy other than the facts as addressed in the memorandum opinion. Fed. R. Civ. P. 56(d). Accordingly, no such specifications were made and the remaining claims proceeded to trial. If there were any misundertanding, this should have been cleared up by the court's pretrial rejection of this line of argument (paper no. 119).

Therefore, from July 9, 1990 to July 12, 1990 this court presided over the trial with an advisory jury pursuant to Fed. R. Civ. P. 39(c). The court has reviewed and heard all the evidence received at trial, both documentary and testimonial, as well as the parties' proposed findings of fact and conclusions of law. In addition, the court has also considered the advisory jury's verdict (paper no. 130; transcript at 493-94). This opinion will serve as the court's

finding of fact and conclusion of law as prescribed by Fed. R. Civ. P. 52(a).

II. Factual Background

The National Football League Players Association ("NFLPA"), represents the players of the NFL in collective bargaining negotiations. The NFLMC is the negotiating arm for the twenty-eight NFL clubs for the purpose of collective bargaining. On December 11, 1982, the NFLMC entered into a five year collective bargaining agreement with the NFLPA. This 1982 agreement was negotiated after the previous 1977 collective bargaining agreement expired.

Among other things, the 1982 bargaining agreement specified that the twenty-eight NFL clubs would make annual pension contributions to the Plan of $12,500,000 every year on or before March 31 of 1983 through 1987. However, the collective bargaining agreement also provided that such contributions were payable only if they were allowed as deductions under the applicable provisions of the Internal Revenue Code.

Under the terms of the collective bargaining agreement the Plan, which had been in existence puruant to previous bargaining agreements, was to be continued and would remain a Taft-Hartley trust. The Plan is a pension and benefit trust for the members of the NFLPA and their families. It is managed by a seven member Retirement Board. Three members of the Retirement Board are appointed by the NFLMC and are the counterclaim defendants in this case. Three members of the Retirement Board are also appointed by the NFLPA, and they are the counterclaim plaintiffs in this action. The seventh and nonvoting member of the Retirement Board is the Commissioner of the NFL.

In 1983, the twenty-eight NFL clubs made the full $12,500,000 contribution to the Plan. The next year, in 1984, the clubs only made a contribution to the Plan in

the amount of $7,436,700. The asserted reason for the failure to pay $5,063,000 was because the Plan was over funded and that the full payment would not be currently tax deductible to the contributing clubs. This position was based upon legal advice from the law firm of Baker & Hostetler. Also, at this time, the NFLMC advised the NFLPA that the NFLMC would agree to extend any time limitations under the collective bargaining agreement or the Plan for the filing of a grievance related to the reduction of the 1983-1984 contribution until after the IRS issued a revenue ruling on whether the excess contributions were currently deductible.

The dispute over the partial contribution first came to a head at the April 18, 1984 meeting of the Retirement Board, when the counterclaim plaintiffs asserted that contributions need not be currently deductible to be due under the collective bargaining agreement. The objection was based on the counterclaim plaintiffs' contention that the Internal Revenue Code provided that payments made in one year could be carried forward and deducted in future years. Because the contributions could be deducted in future years, the deductibility provision of the collective bargaining agreement was not implicated.

At the April 18, 1984 meeting, and in respone to the dispute, the counterclaim plaintiffs sponsored four resolutions for Retirement Board action. First, the counterclaim plaintiffs proposed that the Retirement Board demand immediate payment, with interest, of the amount which had been withheld. Second, the counterclaim plaintiffs moved that the Board authorize legal action against the NFL clubs to recover the entire unpaid sum. Third, it was proposed that a ruling on current deductibility be sought from the Internal Revenue Service ("IRS"), and fourth, that Plan benefits be increased to ensure the current deductibility of the full contribution. In order for a resolution to pass, and for the Plan to take action, a four vote majority is required. It is these resolutions as

well as the counterclaim defendants votes at various Retirement Board meetings which form the factual foundation for the counterclaims.

III. Findings of Fact

The only resolution that passed of the four proposed at the April 1984 meeting of the Retirement Board was the motion for the parties to jointly seek a revenue ruling from the IRS (transcript at 41). The evidence shows that before the vote was taken on this resolution Mr. Keating, co-counsel to the Plan (*id.* at 144), stated on the record that enacting the resolution was in no way a concession or a commitment by the counterclaim plaintiffs that suit would not be brought to collect the contributions for the Plan (*id.* at 66 and 152; counterclaim plaintiffs' exhibit 9 at 1-2). The parties eventually filed a joint request for a ruling on September 10, 1984 (transcript at 116-17). That request was pending before the IRS in 1984, 1985 and 1986 (*id.*).

The motion to increase Plan benefits contained on its face a limitation that benefits be increased only to the extent necessary to eliminate the Plan surplus (*id.* at 90-91). Specifically, the resolution provided,

> Resolved, to approve an increase in plan benefits effective March 31, 1983, at least sufficient to eliminate any excess nondeductible employer contribution amount, if any, in relation to the fixed annual $12.5 million employer contribution set forth in the bargaining agreement and to consider further improvements and increases in plan benefits to eliminate any margin remaining between the actuarial cost of the plan and such required annual $12.5 million employers contribution.
>
> Be it further resolved a committee be established immediately to make these plan improvements.

(*Id.*). The court finds that by its very terms this resolution called for benefit increases that were actuarially sound.[2] Consequently, the limitations contained in § 8.5 of the Plan (counterclaim plaintiffs' exhibit 8 at 41-2), were not implicated. Notwithstanding it's qualified nature, the counterclaim defendants voted aqainst this resolution (transcript at 41).

The counterclaim defendants abstained from voting on the remaining two motions (*id.*). Consequently, the resolution to demand payment and to initiate litigation failed (*id.*).

On October 11, 1984 the NFL clubs ultimately paid to the Plan the $5,063,300 which had been withheld on March 31, 1984, plus $163,713 representing interest at six percent from April 1, 1984 (counterclaim defendants' exhibit 2). The next year the NFL clubs paid the full $12,500,000 in two installments for the 1984 year as of April 1, 1985 (transcript at 45). Finally, in March of 1986, the NFL clubs refused to make any portion of the $12,500,000 annual payment to the Plan (*id.*).

On August 21, 1986 the Retirement Board met again (*id.*). Because the $12,500,000 contribution due in March of 1986 was still not paid, the counterclaim plaintiffs offered two resolutions in an attempt to solve the problem (*id.* at 46). Specifically, these resolutions were to demand immediate payment from the NFL clubs and to sue for payment (*id.*). Although these resolutions were identical with those offered in April of 1984, the counterclaim defendants claimed they needed more time to study the

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[2] At trial the counterclaim defendants argued that because this proposal provides for benefit increases at *least* sufficient to eliminate nondeductibility, the increase could have been greater to any unspecified amount and was therefore actuarially unsound. However, when this sentence is considered in context with the remainder of the proposal, the clear meaning is that the increase was required to be actuarially sound.

motions (*id.*). Therefore, no action was taken and the Plan was once again deadlocked over legal pursuit of these payments (*id.*).

Eventually, on July 30, 1987 the IRS ruled in response the Retirement Board trustees' request (counterclaim defendants' exhibit 6). The ruling concluded that the "excess of the amount contributed ($12,500,000) over the deductible limit under Section 404(a) are not deductible for the year of contribution, but may under Section 404(a)(1)(D) be carried over and deducted in subsequent taxable years subject to the deductible limits for such years." (*Id.* at 3).

The Retirement Board convened again on December 8, 1988 when the March 31, 1987 contribution equalled only $7,111,839.63 instead of $12,500,000 (transcript at 104). At that meeting the counterclaim plaintiffs submitted the following resolution to increase benefit levels:

> BE IT THEREFORE RESOLVED, that Plan benefits be improved effective March 31, 1987 as follows:
>
> 1. Increase Credited Season values by at least one-third for all active players, inactive vested players, pensioners and beneficiaries and surviving widows or children.
>
> 2. Change the vesting schedule from four years to three years effective with the 1987 season, for Players with a Credited Season in 1987 or later.
>
> 3. Increase the $750.00 minimum monthly benefit now provided by Plan Section 5.1 to a $2,000 minimum monthly benefit to current and future retirees for any total and permanent disability not determined as resulting from a football injury incurred while an active Player.
>
> 4. Eliminate current Line-of-Duty disability benefit offset to any Workers' Compensation statute benefits for the same disablement for both current and future retirees.

> 5. Expand coverage under the pre-retirement Widows and Surviving Chlldren's benefit as follows: if no widow or dependent children survive the deceased active or inactive vested player, the benefit is payable to a named "other" beneficiary.

(counterclaim plaintiffs' exhibit 5).

The co-actuary to the Plan, Martin E. Segal Company, had determined that the benefit increases sought by the resolution could be afforded by the Plan and were actuarially sound (transcript at 108). Although the counterclaim defendants were advised that the propoal was actuarially sound, when the resolution was brought to a vote the counterclaim defendants abstained (*id.*). When this vote failed the counterclaim plaintiffs made a second proposal; namely, to have the counterclaim defendants' own actuary review the benefit increases (*id.*). The counterclaim defendants also abstained from voting on this proposal and therefore it failed (*id.*).

Finally, on June 14, 1990 the counterclaim plaintiffs again proposed to the Retirement Board the same increases in benefits that had been proposed in December of 1988 (counterclaim plaintiffs' exhibit 6). Again, the counterclaim defendants declined to act on the proposal and, without a four vote majority, the Plan could not increase benefits (transcript at 108 and 110).

As indicated earlier, the court held that the counterclaim defendants operated with a conflict of interest when voting on the resolutions (paper no. 98 at 8). At the time the resolutions involved in this lawsuit were made, the three counterclaim defendant trustees held the following positions: Willlam Bidwill was owner of the St. Louis/Phoenix Football Cardinals, James Kensil was the President of the New York Jets and Michael Lynn was the Executive Vice President of the Minnesota Vikings (transcript at 36-37). In addition, as a result of the counterclaim defendants' votes, the St. Louis/Phoenix Football Cardinals benefited

by over $630,000, the New York Jets by over $693,000 and the Minnesota Vikings by over $614,000 as well as benefits to all of the other NFL clubs. Moreover, the counterclaim defendants relied upon the legal advice of attorney Sargent Karch of the Baker & Hostetler firm, which also represented the NFL clubs in this litigation.

The evidence produced during trial established that the counterclaim defendants did not contend, at either the 1984, 1988 or 1990 meetings of the Retirement Board, or offer evidence in trial, that the counterclaim plaintiffs' proposals for benefit increases were actuarially unsound or otherwise beyond the Plan's ability to pay. In fact, the uncontroverted expert testimony in this case showed that the benefit increases proposed in 1988 and 1990 were actuarially sound (*id.* at 193 and 194). Accordingly, the court finds by a preponderance of the evidence that the counterclaim plaintiffs' proposed benefit increases were actuarially sound.

Also, the counterclaim defendants did not prove by a preponderance of the evidence that they changed their position to their prejudice or relied upon the counterclaim plaintiffs' action or in actions involving arbitration or the vote to request an IRS revenue ruling. First, with respect to arbitration or a grievance, the court finds that the greater weight of evidence presented at trial established that a dispute involving $5,000,000 or $12,500,000 or $17,800,000 in pension contributions is a "substantial issue" within the meaning of § 8.6 and therefore is not subject to arbitration (counterclaim plaintiffs' exhibit 8 at 42). This finding is supported by the fact that the counterlaim defendants never asserted during any of the Retirement Board meetings that the counterclaim plaintiffs reolutions could or should be submitted to arbitration.

Second, with regard to the IRS revenue ruling, the preponderance of the evidence shows that the counterclaim defendants did not change their position in reliance on the

vote, principally due to Mr. Keating's express statements on this point at the time of the vote. In addition the court finds that a preponderance of the evidence does not support counterclaim defendants' affirmative defense of waiver or estoppel. The evidence shows that suit was filed less than one year after the twenty-eight NFL clubs had failed to make the $12,500,000 contribution in March of 1986. Furthermore, if there were any reliance, the court finds that the counterclaim defendants did not justifiable rely on the short delay or the manner in which counterclaim plaintiffs proceeded during the controversy.

The Retirement Board is vested with "the broadest discretion permitted under the Act" (counterclaim plaintiffs exhibit 8 at 44, § 8.13), and is expressly empowered to amend the Plan (*id.* at 48, § 10.1). Further, subject to the provisions of § 8.5 of the Plan (*id.* at 41-2), the Board has "all necessary powers, including but not limited to the power . . . [t]o define and amend the terms of the Plan and Trust . . . ." (*Id.*). The limitations contained in § 8.5(A) of the Plan (*id.* at 41), which prohibit the Board from altering the amount of contributions otherwise payable to the Plan, are not implicated in this case, inasmuch as the counterclaim plaintiffs never proposed that the Board seek to recover for the Plan and its beneficiaries any more than the $12,500,000 the NFL clubs agreed to pay annually.

Upon consideration of the relevant documents, the court concludes that neither the 1982 collective bargaining agreement nor the Plan itself contain any relevant prohibitions concerning benefit increases by the Retirement Board. As shown above, the Retirement Board has broad discretion and power to amend the Plan, and the implicit authority to increase benefits; authority which it has exercised for as long as such language has been in the Plan. Therefore the language of the Plan permits the Retirement Board to amend its provisions and to increase benefits for Plan beneficiaries and participants.

The Retirement Board was obliged to take no action which "would cause any portion of contributions to the Plan [to] fail to be deductible to the Employers . . . ." (*Id.* at 41). By failing to increase benefits, the counterclaim defendants deprived the NFL clubs of the current deductibility of their payments.[3] Thus, if the clubs' position that contributions had to be deductible in the year when made was correct, § 8.5(B) mandated that the Plan's trustees act to assure the deductibility of the payments. Second, when § 8.5(E), which contains a prohibition against amendments which would render the Plan actuarially unsound, is read together with § 8.5(C), which prohibits the reduction of any benefit, and is coupled with the broad powers of the trustees to amend the Plan, the clear implication is that the Plan's trustees did have the power to increase benefit levels, as long as such increases were actuarially sound.

The preponderance of evidence introduced at trial showed that if the counterclaim defendants had sought and obtained independent advice from attorneys knowledgeable of Employee Retirement Income Security Act ("ERISA") and Taft-Hartley Plans when they were confronted with the counterclaim plaintiffs' proposals, they would have been advised that the Plan should increase benefits for the Plan

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[3] Mr. Bidwill, a counterclaim defendant, admitted that increasing benefits for Plan participants would have cured the Plan's over funded position and would have made payments currently deductible and that nothing in the Plan or bargaining agreement prohibited the trustees from increasing benefits (transcript at 92-94). This testimony was confirmed by Eugene Keating, who credibly testified that the positions of the Plan relating to amendments have been in the governing Plan document since 1976 and that a variety of different benefit increases, including increases in amounts to be paid to players for each credited season, have been adopted by the Retirement Board pursuant to those provisions (*id.* at 150). Mr. Bidwill's deposition testimony also revealed that if he had had independent advice, he would have voted in favor of the resolution to sue the NFL clubs who withheld payment (*id.* at 89-90).

beneficiaries, and failing that, would have been advised to demand payment and to file suit (transcript at 205-08; 232-35). The counterclaim defendants would have been further informed by independent counsel that the success rate in ERISA collection cases is extraordinarily high, and that the Plan could recover double interest as well as attorneys' fees in such a suit (*id.* at 211-12 and 218). In addition, the counterclaim defendants would have been advised to at least seek actuarial advice concerning the motion to amend and increase benefits (*id.* at 234-35).

In making these findings, the court credits the testimony of Thomas J. Hart and Joyce A. Mader, expert witnesses proffered by the counterclaim plaintiffs, both of whom are qualified and knowledgeable in the field of Taft-Hartley ERISA plans. The stated foundation for their hypothetical advice was solid and stood up under cross-examination. On the other hand, the expert testimony of Jeffrey R. Fuller and Sander L. Wise for the counterclaim defendants on these points cannot be wholly credited or accepted.

Mr. Thomas J. Hart has been practicing law for the government and in the private sector since 1972 (*id.* at 199). Most of that time he has specialized in ERISA with a particular emphasis on Taft-Hartley plans (*id.* at 198). Over the years Mr. Hart has represented approximately 25 funds of the sort involved in this litigation (*id.* at 201). Without objection Mr. Hart was accepted as an expert witness in advice to trustees of plans similar to the one involved in this litigation (*id.* at 202).

Several aspects of Mr. Hart's testimony made it particularly credible. First, Mr. Hart's answers to the questions put to him were concise and straight-forward. In addition, his answers on cross-examinations were direct and relatively non-adversarial. However, more than just demeanor made Mr. Hart's testimony persuasive. For example, he did not hesitate to voice his disagreement with counterclaim plaintiffs' action (*id.* at 208, 210-11, 212). Also, Mr. Hart's advice to the trustees focused, properly,

on the duties and obligations of the trustees (*id.* at 212 and 216). Further, this witness considered alternative advice even if the counterclaim defendants' position was correct, but still came to the same conclusions (*id.* at 216-17 and 219). Finally, Mr. Hart impressed the court due to the fact that his opinion was based on the context of the entire problem presented to him, and not just isolated events (*id.* at 219).

Ms. Joyce A. Mader has been practicing law since 1976 and is a partner at the law firm of O'Donoghue & O'Donoghue in Washington, D.C. (*id.* at 228). This firm practices primarily in areas of employee benefits and labor law (*id.* 228-29), and Ms. Mader has represented approximately 70 Taft-Hartley trusts (*id.* at 230). Ms. Mader was accepted without objection as an expert in advice to trustees of plans similar to the one involved in this litigation (*id.*)

Ms. Mader's qualifications were extraordinary. Not only is she a partner with a well-respected and well-known employee benefits firm (*id.* at 228), but she has also given a number of presentations, papers and speeches related to employment issues (*id.* at 230). In addition, Ms. Mader's demeanor on the stand impressed the court as being consistent with a person who has given fair consideration to all the issues involved in this case (*id.* at 232). Similar to Mr. Hart, many specific aspects of Ms. Mader's testimony support the court's finding that her testimony should be credited.

First, Ms. Mader kept her attention on the obligation of a trustee to act in the sole and exclusive interest the Plan's participants (*id.* at 233-34). Second, Ms. Mader's insight was demonstrated by some of her answers which presented important issues not framed by counsel; for instance, her discerning comment that the trustees not only had an obligation to amend the benefits, but failing that,

should have least investigated the actuarial soundness of benefit increases proposed (*id.* at 234-35 and 256). Next, Ms. Mader's comments concerning the alternatives of grievance (*id.* at 239), arbitration (*id.* at 245-46) and an IRS revenue ruling impressed the court. She did not simply end her analysis by stating that these alternatives were or were not available, but she continued and commented that even if these alternatives were pursued they probably would not have solved the immediate problem at hand (*id.* at 246, 248 and 250-51). Fourth, throughout her testimony, this witness continued to focus on the reality and practicality of the situation faced by the trustees (*id.* at 253).

Finally, the court was impressed by the fact that Ms. Mader placed the resolutions on a scale of importance. The trustees' primary responibility was to amend the Plan (*id.* at 232 and 254), then to bring suit and demand payment (*id.* at 232-33), and seek an IRS ruling as a last option (*id.* at 250). These conclusions were based on their effectiveness for resolving the problem faced by the trustees. Importantly, although Mr. Hart did not approach the problem from this same angle, he reached the same conclusion (*id.* at 219). This apparently unintended corroboration made the testimony of these two witnesees particularly credible.

In contrast to these two witnesses, the testimony of the counterclaim defendants' expert witnesses was not as persuasive. Although the qualifications of the counterclaim defendants' witnesses did not significantly affect the court's evaluation, the substance of their testimony did.

Mr. Jeffrey R. Fuller has practiced law in the area of Taft-Hartley plans for approximately eighteen years (*id.* at 280). Mr. Fuller has personally worked with about twenty Taft-Hartley and multi-employer plans (*id.* at 282). This witness was accepted as an expert in the field without objection (*id.* at 291). As soon as Mr. Fuller began his testimony, however, instead of simply stating his opinion, he immediately began making qualifications and distinc-

tions primarily directed at rebutting the previous expert testimony (*id.* at 291-92). The court was not impressed by this approach because it appeared that Mr. Fuller was interested in the outcome of the litigation rather than simply expressing his independent expert opinion.

Next, it was Mr. Fuller's opinion that the IRS revenue ruling would be a fair way to resolve the issues presented to the trustees (*id.* at 298). This concluslon, however, is not particularly persuasive in light of the previous expert testimony. Further, Mr. Fuller felt obliged to make entirely unresponsive comments, which appeared to be made only for the purpose of supporting the counterclaim defendants' case, rather than support his independent conclusions or explain his opinions (*e.g. cf. id.* at 298, line 17-18 with paper no. 32 at l4). Lastly, the court finds it probative that Mr. Fuller, in contrast to Mr. Hart and Ms. Mader, made reference to the trustees' obligation to the plan only once in his direct testimony, and then in a qualified manner (transcript at 297).[4]

Mr. Sander L. Wise, although qualified, was certainly not as well qualified as counterclaim plaintiffs' experts. Mr. Wise has worked in the Taft-Hartley benefits area since 1962 (*id.* at 344), but has only been involved with about fifteen plans (*id.*). At the present time he is only involved with six or seven such plans (*id.* at 345). Mr. Wise was accepted as an expert in Taft-Hartley plans and advice to trustees of those plans without objection (*id.* 348).

Beyond Mr. Wise's credentials, his testimony indicated that his opinion should not be given as much weight as Mr. Hart's or Ms. Mader's. For example, Mr. Wise's direct examination does not even address the fact that the trust-

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[4] The court notes that to the extent that Mr. Fuller's testimony is credited, his testimony establishes a further breach of fiduciary duty on behalf of the counterclaim defendants consistent with Ms. Mader's conclusions (*id.* at 314).

ees have a primary obligation to the Plan's beneficiaries. Second, Mr. Wise opined that arbitration was a viable alternative (*id.* at 358). As mentioned above, however, this option doee not appear to be very useful or practical in order to resolve the problem the trustees faced.

In addition, the substance of Mr. Wise's opinion was that the resolutions to demand payment and initiate suit were premature, and that other action should have been taken to resolve the problem of interpretation quickly (*id.* at 352, 355 and 375). However, the weight of evidence in this trial indicated that Mr. Wise's alternative solution of requesting an IRS revenue ruling would *not* have resolved the questions of interpretation (*id.* at 375). In light of this inconsistency, Mr. Wise's testimony carries little weight.

Further, Mr. Wise was also of the opinion that arbitration would have been a solution. As explained by Ms. Mader, however, this option would have resolved nothing and probably would have resulted in additional satellite litigation. The last inconsistency in Mr. Wise's testimony concerns the urgency of seeking a solution. At one point he agreed that a solution should be sought as expeditiously as possible (*id.* at 375), yet later in his testimony he saw no problem with delay (*id.* at 379 and 387).

Mr. Wise also testified that, in his opinlon, the contributions levels set in Plan were fixed, and that the parties intended that the benefit should be reduced in the event of nondeductibility (*id.* at 351). The court finds that this aspect of Mr. Wise's testimony is incorrect, and therefore throws a shadow over the rest of his opinions. The resolution of whether benefit levels are fixed requires the court to determine the meaning of the language in several provisions of the relevant documents.

Section 3.1 of the Plan (counterclaim plaintiffs' exhibit 8) provides, as mentioned above, that certain specified annual contributions should be made provided that such contributions are allowable as deductions under the applicable

provisions of the Internal Revenue Code (*id.* at 11; counterclaim plaintiffs' exhibit 1 at 63). On the other hand, § 4.1 provides that for each credited season, a player is entitled to a specified benefit (*id.* at 13).

In light of the court's finding that allowable as deductions does not mean currently deductible, and that the full $12,500,000 contribution was due each year, the specific benefit provisions must have been provided only as a minimum. Without flexibility in § 4.1, the Plan would always be over funded. Because § 3.1 does not provide for flexibility in the amount of contribution, § 4.1 must be the variable provision. However, even if § 3.1 is the section which provides for flexibility, contrary to the plain meaning of the documents, these two provisions on their face create an ambiguity, and parol evidence must be considered. The weight of evidence establishes that the parties intended the benefits provision only to be a floor in order to provide for the required adjustments (transcript at 55).

Mr. Wise's conclusion was based on the erroneous premise that the language of § 3.1 which provides for contributions was "somewhat equivocal" because he believed the allowable as a deduction language meant currently deductible (trancript at 351). However, as the court has already found, the allowable as deduction language does not permit the NFL clubs to equivocate from their $12,5000,000 obligation (paper no. 32).

In light of all of this, the court finds the opinions of Mr. Hart and Ms. Mader to be the most compelling. There is one additional factor which leads the court to this conclusion. Both Mr. Fuller and Mr. Wise premised their expert opinions on conclusions which the court has flatly rejected (*e.g. cf. id.* at 296, 297, 298-99, 305-06, 351, 353 and 354 with paper no. 32 at 10 and 11; 151 at 15-16 and 22). Accordingly, the court will not accept opinions based on these flawed premises.

Finally, the court finds that the preponderance of the evidence establishes that the Plan was harmed as a direct consequence of the fiduciary breaches committed by the counterclaim defendants. The fiduciary breaches were a substantial cause of the harm because the counterclaim defendants' continued failure to support the resolution to amend, which a reasonable trustee would have supported, created the deadlocks which prevented the Plan from receiving the full contributions. Also, the court finds that if the counterclaim defendants had voted in favor of the resolutions to demand payment and sue, as they should have, the Plan would have recovered the delinquent contributions. Finally, if the counterclaim defendants had investigated alternatives to their flat refusals, they would have found an actuarially sound method of improving benefits which would have resolved the nondeductibility dispute and removed their only basis for resisting benefit amendment. Specifically, therefore, the Plan was harmed when it did not recover the double interest of $163,713 on the 1984 partial payment that the NFL clubs withheld from March 31, 1984 until October 10, 1984 (transcript at 39 and 44). Further, the Plan was harmed when it did not receive the $12,500,000 payment the NFL clubs withheld in 1986 and the $5,348,160 payment withheld in 1987 (*id.* at 45 and 156).

The court also finds that the preponderance of the evidence shows that the beneficiaries and participants of the Plan were harmed by the counterclaim defendants' fiduciary breaches. The court, as the finder of fact, is permitted to draw reasonable inferences from the evidence. *Schultz v. Pennsylvania R.R.*, 350 U.S. 523, 526 (1956). In this case if the Plan had recovered the full amount it was entitled to, the trustees would have been obligated to raise benefits in order to 1) ensure deductibility (counterclaim exhibit 8 at 41), and 2) resolve the over funding problem. Because the benefits would have been raised, but were not, the beneficiaries were harmed by not receiving

the full amount of benefits they should have received under the collective bargaining agreement.

IV. Conclusions of Law

The court holds that the Plan at the center of this litigation was established pursuant to the Taft-Hartley Act, 29 U.S.C. § 106(c)(5), and is regulated by the provisions of ERISA, 29 U.S.C. §§ 1001-1500. The assets of the Plan are held for the exclusive purposes of providing benefits to participants in the Plan and defraying reasonable administrative costs (counterclaim plaintiffs' exhibit 8 at 11). 29 U.S.C. § 1103(c)(1).

The trustees of the Plan are fiduciaries within the meaning of ERISA, 29 U.S.C. § 1002(21)(A), and have certain fiduciary duties, obligations and liabilities. *Id.* § 1104. The statute provides for the duty of care as follows:

> (1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and benefciaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstance then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims
>
> . . .

§ 1104(a)(1)(A) and (B). This is commonly called the prudent person standard. *Id.* § 1104(a).

In the conduct of the Plan's affairs, trustees of Taft-Hartley and ERISA plans have, regardless of whether they were appointed by the employees or the employers, an

unwavering duty of complete loyalty to the beneficiaries of the Plan and not to the employer or to the union. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 334 (1981). A trustee cannot serve two masters, and at all times his or her sole concern is to the Plan's beneficiaries. *Id.* at 329-30.

Furthermore, when presented, as the counterclaim defendants were, with a clear conflict of interest, the counterclaim defendants were obligated to either step aside or conduct a scrupulous and thoroughly independent investigation of their options. *Schaeffer v. Arkansas Medical Society*, 853 F.2d 1487, 1491 (8th Cir. 1988); *Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984); *Donovan v. Bierwirth*. 680 F.2d 263, 271 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982). The trustees are also required to ensure that "a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries . . . ." *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571-72 (1985). The court holds that the counterclaim defendants breached these duties in at least four different ways.

First, the counterclaim defendants did not step aside when presented with the conflict. Second, the court holds that they did not conduct a thorough and scrupulous investigation of their options. As stated above, if they had sought independent advice, and had followed such advice, the Plan would not have remained deadlocked on the motions to demand and or sue for the delinquent payments.

Third, trustees of an over funded plan, or a plan where employer contributions may exceed the maximum deductible payment have an additional duty to increase benefits where the governing documents do not prohibit or restrict trustees from acting in the interest of the beneficiaries by increasing benefits. *Sinai Hosp.of Baltimore v. National Benefit Fund*, 697 F.2d 562, 567 (4th Cir. 1982). As the court found above, the governing documents in this case do not prohibit amendment of the benefits if such amend-

ment is actuarially sound. Finally, the counterclaim defendants did not proceed prudently when they refused to even investigate the actuarial soundness of the counterclaim plaintiffs' proposal (transcript at 234-35 and 314).

As fiduciaries, the counterclaim defendants are personally liable to the Plan for any losses which it suffered as a consequence of such breaches. 29 U.S.C. § 1109(a). Each of the counterclaim defendants is liable for the breaches of the other for two reasons. First they knowingly participated in the breaches of the others, and second they failed to take reasonable steps to remedy the breaches of the others. 29 U.S.C. § 1105(a); *Katsaros v. Cody*, 568 F. Supp. 360, 367-68 (S.D.N.Y. 1983). Any one of them could have remedied the breach of the other by voting in favor of the counterclaim plaintiffs' resolutions creating a four to two majority.

The counterclaim defendants take refuge in the principle of law that the trustees may only act within various legal constraints. That is, the legal documents such as the collective bargaining agreement and Bert Bell NFL Player Retirement Plan allegedly limit their authority. Although the legal principle is correct, it affords no relief to the counterclaim defendants. As explained above, the counterclaim defendants rely on incorrect constructions of the relevant documents.

This court has already held that the contributions the twenty-eight NFL clubs withheld from the Plan were due and owing and that contributions need not be deductible in the year when made in order to be allowable as deductions under the applicable provisions of the Internal Revenue Code (paper no. 32). The IRS has determined that the contributions in question could be carried forward by the NFL clubs and be deducted in future years.

The court has already found that disputes over contributions the NFL clubs were obliged to make were not subject to arbitration. In addition, the court holds as a

matter of law that trustees are not required to utilize a contract arbitration procedure to pursue delinquent pension contributions (Counterclaim plaintiffs' exhibit 8 at 42). *Schneider Moving & Storage v. Robbins*, 466 U.S. 364, 371-72 (1984).

As mentioned above, the court has already determined that the counterclaim defendants were operating under a conflict of interest and breached their fiduciary duties by failing to conduct an independent investigation of the counterclaim plaintiffs' proposals to sue for the delayed payments and to increase benefit levels (paper no. 98 at 7-9). This conclusion is further supported by a Department of Labor Opinion. If a trusteee "participates in the process leading up to a [plan] decision to defer, reduce or write off a delinquent employer contribution" and "the trustee is an affiliate of the employer who is delinquent in making its contributions to the plan," as occurred here, "the trustee would be deemed to be acting on behalf of or representing a party whose interest are adverse to the plan and such participation would result in a violation of Section 406(b)(2)." *Department of Labor Pension & Welfare Benefit Programs Opinion* 77-91 (April 22, 1977).

By failing to seek independent advice the counterclaim defendants remained oblivious to the fact that Congress had anticipated that Plan trustees would be confronted with the type of issue that was presented here, and provided mechanisms for dealing with such matters. Specifically:

> the tax laws also mitigate the effect of the ceiling on deductibility in two ways. Employers may carry forward excess contributions in one year and deduct them in later years, 26 U.S.C. § 404(A)(1)(e), or they may deduct such contributions to the extent that they increase employee

> benefits, in essence raising the point of full funding after the fact. 26 U.S.C. § 412(c)(8); 29 U.S.C. § 1082(c)(8).

Bituminous Coal Operators' Ass'n v. Connors, 867 F.2d 625, 630 (D.C. Cir. 1989).

Therefore, under these circumstances, it is not the burden of the counterclaim plaintiffs to show that the Plan was harmed by the actions and inactions of the counterclaim defendants. Rather, the burden of proof is on the trustees who breached their duties to show that the Plan and beneficiaries were not harmed. In other words, the counterclaim defendants were required to prove that, even if they had conducted an independent investigation and had acted as prudent trustees not operating under a conflict of interest, they still would not have authorized the Plan to file suit or approved an increase in benefit levels as proposed by the counterclaim plaintiffs. *Brink v. DaLesio*, 667 F.2d 420, 426 (4th Cir. 1981); *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985); *Leigh*, 727 F.2d at 133-39; *Donovan v. Cunningham*, 716 F.2d 1455, 1467-68 (5th Cir. 1983); *Marshall v. Snyder*, 527 F.2d 894, 900 (2d Cir. 1978); *Nedd v. United Mine Workers of America*, 556 F.2d 190, 210-11 (3rd Cir. 1977); *Fine v. Semet*, 514 F. Supp. 34, 42-3 (S.D. Fla. 1981), *aff'd*, 699 F.2d 1091 (11th Cir. 1983); *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C. 1971).

That this is the correct burden is demonstrated by counterclaim defendants' argument on this point. Counterclaim defendants argued that because, in their view, the burden rested on counterclaim plaintiffs, the counterclaim plaintiffs were required to show that the counterclaim defendants would have voted on the resolutions in a different way (transcript at 276). In order to prove this, according to counterclaim defendants, the counterclaim plaintiffs would have had to put the counterclaim defendants on the stand and ask them what they would have done (*id.* at 277). It

takes very little imagination to determine what the counterclaim defendants' testimony would be on this point.

Thus, once the counterclaim plaintiffs establish a conflict, which they have (paper no. 98), then the burden shifts because there is simply no way that counterclaim plaintiffs can prove what the counterclaim defendants would have done. It is appropriate, therefore, that the counterclaim defendants explain the reasons for their actions. As explained above, however, even if the burden did not shift, Mr. Bidwill's testimony establishes that if he had had independent advice, he would have voted in favor of the resolutions, thus creating a majority. Further, the court has found that a prudent trustee would have voted in favor of the resolutions.

However, even if the burden of proof were as counterclaim defendants argue with respect to damages, the court has found that the preponderance of evidence in this case demonstrates that the Plan was harmed by the fiduciary breaches of the counterclaim defendants. The counterclaim defendants' argument that the Plan and its beneficiaries have not been harmed because the disputed contributions have been paid into the court's registry is unpersuasive. The simple fact is that the monies have not been paid into the Plan where such sums could be used for the Plan's beneficiaries and participants as required by law. Equally important, the fact that such amounts have been paid into the registry is not due in any way to affirmative steps by the counterclaim defendants, who oppose the payment to this very day.

Therefore, the Plan is entitled to recover the double-interest from the counterclaim defendants which it would have recovered if they had not breached their fiduciary duties by failing to vote to sue the NFL clubs in 1984 for the $5,063,300 which the clubs refused to pay. The Plan would have received an additional six percent interest

amounting to $163,713 but for the counterclaim defendants' fiduciary breaches.

In addition, the Plan is also entitled to recover from the counterclaim defendants the amount of the contributions which the Plan did not receive from the NFL clubs in 1986 and 1987 as a result of the counterclaim defendants' fiduciary breaches. Specifically, these amounts are $12,500,000 as of March 31, 1986, and $5,348,160 as of March 31, 1987. Finally, the Plan is also entitled to recover from the counterclaim defendants twelve percent interest compounded annually from the date that each of these payments could have been recovered to the date of payment because the Plan would have recovered interest at this rate from the delinquent employers but for the counterclaim defendants' fiduciary breaches.

The court will enter a separate order.

/s/ Joseph C. Howard
United States District Judge
Joseph C. Howard

Dated: October 29, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWILL, et al.,
plaintiffs,

v.

EDWARD R. GARVEY, et al.,
defendants and counterclaim plaintiffs,

v.

WILLIAM V. BIDWILL, et al.,
counterclaim defendants.

CIVIL NO. JH-87-509

ORDER

In accordance with the opinion dated October 29, 1990 (paper no. 151), and the memorandum opinion dated October 29, 1990 (paper no. 152), it is this 15th day of November, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1) that judgment BE, and the same IS, ENTERED IN FAVOR OF COUNTERCLAIM PLAINTIFFS for the amount of $163,713 for unpaid interest on the partial 1984 contribution;

2) that judgment BE, and the same hereby IS, ENTERED IN FAVOR OF COUNTERCLAIM PLAINTIFFS for the amount of $12,500,000 for the 1986 unpaid contribution, plus twelve percent interest, compounded annually from the date that this payment was due until the date of payment;

3) that judgment BE, and the same hereby IS, ENTERED IN FAVOR OF COUNTERCLAIM PLAINTIFFS

for the amount of $5,348,160 for the 1987 unpaid contribution, plus twelve percent interest, compounded annually from the date that this payment was due until the date of payment;

4) that counterclaim plaintiffs' motion for entry of judgment BE, and the same hereby IS, DENIED as moot;

5) that counterclaim plaintiffs' motion for permanent injunctive relief BE, and the same hereby IS, GRANTED in part and DENIED in part consistent with the memorandum opinion dated October 29, 1990 (paper no. 152);

6) that the Clerk of Court CLOSE this case, and

7) that the Clerk of Court mail copies of this order to all counsel of record.

/s/Joseph C. Howard
United States District Judge
Joseph C. Howard

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WILLIAM V. BIDWILL, et al.,
plaintiffs,

v.

EDWARD R. GARVEY, et al.,
defendants and: counterclaim plaintiffs,

v.

WILLIAM V. BIDWILL, et al.,
counterclaim defendants.

THOMAS J. CONDON et al.,
Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE et al.,
Defendants.

CIVIL NO. JH-87-509

ORDER GRANTING INJUNCTIVE RELIEF AND DIRECTING THE ENTRY OF FINAL JUDGMENT ON ALL CLAIMS AND STAY OF EXECUTION

In accordance with the Court's Memorandum Opinion dated July 22, 1988; the Order of July 22, 1988, as amended on August 31, 1988; the Court's Memorandum Opinion and Order dated May 7, 1990; the trial conducted on July 12-14, 1990; the findings of fact and conclusions of law set forth in the Court's Opinion dated October 29, 1990; the Court's Memorandum Opinion dated October 29, 1990, relating to appropriate injunctive relief; the Court's Order dated November 15, 1990; the Court's letter-order

dated November 19, 1990, relating to the appointment of a Special Master; and this Court's Memorandum and Order awarding attorneys' fees dated November 19, 1990, and the Court having made the express determination that there is no just reason for delay and the express direction for the entry of final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, it is by the Court this 4th day of December, 1990;

ORDERED, that the Trustees of the Bert Bell NFL Player Retirement Plan ("Plan"), shall amend the Plan to increase benefit levels as proposed by the Player-Trustees in Resolutions proposed in December 1988 and June 1990, provided such benefit levels are actuarially sound, as determined by the Special Master to be appointed by the Court and subject to further Order of the Court upon review of the Special Master's Report, all pursuant to Rule 53, Federal Rules of Civil Procedure; and it is

FURTHER ORDERED, that the Trustees of the Plan shall, at the cost of the Plan, distribute by mail a copy of this Order and a copy of the Court's Opinion containing its findings and conclusions dated October 29, 1990 to all Plan participants and parties in interest; and it is

FURTHER ORDERED, that the Clerk shall enter final judgment in favor of the Plaintiffs against the Defendants in Case No. JH-87-698, in the following amounts, in accordance with this Court's Order dated July 22, 1988, as amended on August 31, 1988:

(a) $17,848,160.37 representing unpaid contributions to the plan, withheld on March 31, 1986, and March 31, 1987;

(b) an amount representing interest at an annual rate of 6 percent for one day on $5,997,013.37;

(c) an amount representing interest at an annual rate of 6 percent on $12,500,000 running from

April 1, 1986, to the date of payment of the principal obligation;

(d) an amount representing interest an at annual rate of 6 percent on $5,348,160.37 running from April 1, 1987, to the date of payment of the principal obligation;

(e) an additional amount equal to the total accumulated interest awarded on contributions withheld from the Plan pursuant to subparagraphs (c) and (d) hereof; and it is

FURTHER ORDERED, that the Clerk shall enter final judgment in favor of plaintiffs against the Counterclaim-Defendants in Case No. JH-87-509 William V. Bidwill, Michael Lynn, and James Kensil, in the following amounts, in accordance with this Court's Order dated November 15, 1990:

(a) $163,713.00 for unpaid interest on partial 1984 contributions, plus interest thereon at the judgment rate from October 10, 1984 until the date of payment;

(b) in the amount of $12,500,000 for the 1986 unpaid contribution, plus twelve percent interest, compounded annually from April 1, 1986 until the date of payment;

(c) in the amount of $5,348,160 for the 1987 unpaid contribution, plus twelve percent interest, compounded annually, from April 1, 1987 until the date of payment, and it is

FURTHER ORDERED, that the final money judgments to be entered pursuant to the preceding paragraphs are based upon alternative theories of recovery and shall not be accumulated; and it is

FURTHER ORDERED, that the Clerk shall enter final judgment in favor of the Plaintiffs against the Defendants

in Case No. JH-87-698 and Counterclaim-Plaintiffs against the Counterclaim-Defendants in Case No. JH-87-509, payable to Yablonski, Both and Edelman and Linquist and Vennum for attorneys' fees and litigation expenses in the amount of $781,972.87, with interest thereon at the judgment rate from November 19, 1990 until the date of payment; and it is

FURTHER ORDERED, that, in accordance with the Court's Memorandum and Order dated July 22, 1988, the Complaint in No. JH-87-509 is dismissed as MOOT; and it is

FURTHER ORDERED, pursuant to stipulation between the parties, that execution on the judgments to be entered shall be stayed and enforcement of the injunctive relief shall be treated as set forth below:

1. In lieu of posting of a bond or supersedeas, this Court's Order dated October 3, 1988 is modified to direct the continued maintenance of the monies in the Court's Registry until such time as appeals from this Order are concluded or until the time for taking appeals or seeking certiorari has expired. In addition, Defendants in No. JH-87-698 and Counterclaim-Defendants in No. JH-87-509 shall deposit into the Court's Registry (established in accordance with this Court's October 3, 1988 Order) on or before December 31, 1990 the amount of $2,706,325.34 which also shall be maintained in lieu of posting of a bond or supersedeas until such time as appeals from this Order are concluded or until the time for taking appeals or seeking certiorari has expired. To assure that the amounts in the Court's Registry are sufficient to include all interest which is accruing on the judgments during the pendency of appellate proceedings, any party may apply to

the Court for an Order directing that additional payments be made into the Registry;

2. In lieu of posting of a bond or supersedeas relating to the payment of attorneys' fees and litigation expenses, Defendants in No. JH-87-698 and Counterclaim-Defendants in No. JH-87-509 shall deposit with the Clerk on or before December 31, 1990, to be maintained in a separate account in the Court's Registry, the amount of $788,367.64, representing the amount awarded on November 19, 1990, plus interest at the judgment rate until such time as appeals from this Order are concluded or until the time for taking appeals or seeking certiorari has expired;

3. If the amounts described in ¶¶ 1 and 2 are deposited into the Court's Registry on or before December 31, 1990, the Player-Trustees shall forbear execution upon any judgments until such time as appeals from this Order are concluded or until the time for taking appeals or seeking certiorari has expired;

4. The Court's appointment of a Special Master and the proceedings to be conducted by the Special Master shall not be stayed and no application for a stay of those proceedings will be made by any party; those portions of this Order directing an amendment of the Plan to increase benefits and publication of the Court's Opinion and this Order shall be stayed pending the outcome of proceedings before the Special Master and the Court's review of the Special Master's Report;

5. In the event the Court, upon review of the Special Master's Report, directs that the Plan be amended to increase benefit levels, the Defendants in No. JH-87-698 and the Counterclaim-Defendants in No. JH-87-509 shall be given

a ten (10) day stay from the enforcement of any injunctive relief and if a request for a further stay is filed, the stay from enforcement of any injunctive relief will continue until this Court or the Court of Appeals for the Fourth Circuit, if necessary, rules on the motion to stay, but nothing herein shall be deemed to alter or change the burden on the party seeking the stay; and

6. The parties have agreed to notice appeals within ten (10) days of the entry of this Order; and the Clerk is hereby directed to transmit the record on appeal to the United States Court of Appeals for the Fourth Circuit as expeditiously as possible upon the filing of the first Notice of Appeal; and it is

FURTHER ORDERED, that the Clerk shall mail copies of this Order to all counsel of record.

/s/Joseph C. Howard
Joseph C. Howard
United States District Judge

APPROVED AS TO FORM:

/s/Joseph A. Yablonski
Joseph A. Yablonski
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/s/George Beall
George Beall
HOGAN & HARTSON
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APPENDIX I

United States Court of Appeals
For the Fourth Circuit

No. 91-2308

William V. Bidwill, et al.

v.

Edward R. Garvey, et al.

No. 91-2309

Edward R. Garvey, et al.

v.

National Football League, et al.

No. 91-2310

Edward R. Garvey, et al.

v.

National Football League, et al.

Filed October 9, 1991

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

Appellants have disputed the district court's rulings with respect to the interest due on unpaid plan contributions and with respect to the award of attorneys' fees based upon proceedings involving the fiduciary duty claims of the appellees. The Court has considered the responsive filings of both parties on these issues. The case is remanded to the district court with directions to review its award of attorneys' fees and interest in light of this Court's disposition of the appeal, including its holding that appellants committed no breach of fiduciary duty.

In all other respects, the petition for rehearing is denied. I have the concurrence of Judge Chapman and Judge Hilton (USDJ,ED/VA).

As no member of the Court requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the suggestion for rehearing in banc is denied.

For the Court,

JOHN M. GREACEN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 91-2308(L)
(CA-87-509-JH, CA-87-698-JH)

William V. Bidwill, et al,
Plaintiffs-Appellants,

versus

Edward R. Garvey, et al,
Defendants-Appellees.

Filed: October 28, 1991

ORDER

The Court amends its opinion filed August 30, 1991, as follows:

On page 13, second full paragraph, lines 2-3—the second sentence of the paragraph is deleted. The full paragraph now reads: "We therefore affirm the judgment of the district court that the clubs owe the Plan $17.8 million in unpaid contributions."

For the Court-By Direction

/s/ John M. Greacen
CLERK

APPENDIX J

26 U.S.C. § 404(a)(1)

§ 404. DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN

(a) GENERAL RULE. If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under this chapter; but if they would otherwise be deductible, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

(1) PENSION TRUSTS.—

(A) IN GENERAL.—In the taxable year when paid, if the contributions are paid into a pension trust, and if such taxable year ends within or with a taxable year of the trust for which the trust is exempt under section 401(a), in an amount determined as follows:

(i) the amount necessary to satisfy the minimum funding standard provided by section 412(a) for plan years ending within or with such taxable year (or for any prior plan year), if such amount is greater than the amount determined under clause (ii) or (iii) (whichever is applicable with respect to the plan),

(ii) the amount necessary to provide with respect to all of the employees under the trust the remaining unfunded cost of their past and current service credits distributed as a level

amount, or a level percentage of compensation, over the remaining future service of each such employee, as determined under regulations prescribed by the Secretary, but if such remaining unfunded cost with respect to any 3 individuals is more than 50 percent of such remaining unfunded cost, the amount of such unfunded cost attributable to such individuals shall be distributed over a period of at least 5 taxable years,

(iii) an amount equal to the normal cost of the plan, as determined under regulations prescribed by the Secretary, plus, if past service or other supplementary pension or annuity credits are provided by the plan, an amount necessary to amortize the unfunded costs attributable to such credits in equal annual payments (until fully amortized) over 10 years, as determined under regulations prescribed by the Secretary.

In determining the amount deductible in such year under the foregoing limitations the funding method and the actuarial assumptions used shall be those used for such year under section 412, and the maximum amount deductible for such year shall be an amount equal to the full funding limitation for such year determined under section 412.

* * * *

(E) CARRYOVER.—Any amount paid in a taxable year in excess of the amount deductible in such year under the foregoing limitations shall be deductible in the succeeding taxable years in order of time to the extent of the difference between the amount paid and deductible in each such succeeding year and the maximum amount

deductible for such year under the foregoing limitations.

26 U.S.C. § 4972(c)

(c) NONDEDUCTIBLE CONTRIBUTIONS.—
For purposes of this section—

(1) IN GENERAL.—The term "nondeductible contributions" means, with respect to any qualified employer plan, the sum of—

(A) the excess (if any) of—

(i) the amount contributed for the taxable year by the employer to or under such plan, over

(ii) the amount allowable as a deduction under Section 404 for such contributions (determined without regard to subsection (e) thereof), and

(B) the amount determined under this subsection for the preceding taxable year reduced by the sum of

(i) the portion of the amount so determined returned to the employer during the taxable year, and

(ii) the portion of the amount so determined deductible under Section 404 for the taxable year (determined without regard to subsection (e) thereof).